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PREPARATIONS FOR A HANDBOOK ON RESTRICTIVE BUSINESS PRACTICES LEGISLATION

Handbook on Restrictive Business Practices Legislation

Note by the UNCTAD secretariat

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INTRODUCTION

1. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, in section F.6 (c), provides for the compilation of a Handbook on Restrictive Business Practices Legislation.

2. The Intergovernmental Group of Experts on Restrictive Business Practices, in the agreed decisions and conclusions adopted at its sixth session, requested the UNCTAD secretariat to continue compiling the Handbook, as carried out so far (in documents TD/B/RBP/33 and TD/B/RBP/42), taking into account the comments made by regional groups at the session. Further compilations of the Handbook are contained in documents TD/B/RBP/49 and TD/B/RBP/58 and Add.1, submitted at the seventh and eighth sessions of the Group, respectively.

3. At its eighth session, the Intergovernmental Group of Experts, in its agreed decisions and conclusions, requested the UNCTAD secretariat to prepare for the ninth session of the Group, as well as for the Review Conference, a further compilation of the Handbook on Restrictive Business Practices Legislation (TD/B/1236-TD/B/RBP/67, annex I).

4. The Secretary-General of UNCTAD, in his note of 2 March 1988 (TD/B/420/8(6)), requested States which so far had not done so, or which had introduced new or amending RBP legislation since their last communication to the UNCTAD secretariat, to provide the UNCTAD secretariat with their relevant legislation, court decisions and comments, on the basis of the format supplied (see below). In order to facilitate the reproduction of texts of legislation in more than one official language of the United Nations, States were invited, as called for by the Intergovernmental Group, to submit, if possible, the text of their legislation in one or more other languages of the United Nations.

5. To date, legislation and comments from Chile, France, Pakistan, Portugal, the Republic of Korea, Sri Lanka, Canada, Sweden and Kenya have been reproduced. The present note contains the commentaries received from the Federal Republic of Germany and Finland, and it reproduces in the annex the texts of the RBP laws of these countries in the languages in which they were received.

6. The UNCTAD secretariat is grateful to the Governments that have contributed the material requested for the compilation of the Handbook, and again requests States which have not yet done so, or which have amended or enacted new legislation since their last contribution, to supply texts of their legislation and commentaries along the lines of the format attached to the note of the Secretary-General of UNCTAD mentioned above, and reproduced below:

FORMAT FOR CONTRIBUTIONS TO THE HANDBOOK

A. Description of the reasons for the introduction of the legislation.

B. Description of the objectives of the legislation and the extent to which they have evolved since the introduction of the original legislation.

READEX FICHE

C. Description of the practices, acts or behaviour subject to control, indicating for each:

(a) The type of control, for example: outright prohibition; prohibition in principle; or examination on a case-by-case basis;

(b) The extent to which the practices, acts or behaviour in section D, paragraphs 3 and 4, of the Set of Principles and Rules are covered by this control, as well as any additional practices, acts or behaviour that may be covered, including those covered by controls relating specifically to consumer protection, for example, controls concerning misleading advertising.

D. Description of the scope of application of the legislation, indicating:

(a) Whether it is applicable to all transactions in goods and services and, if not, which transactions are excluded;

(b) Whether it applies to all practices, acts or behaviour having effects on that country, irrespective of where they are committed;

(c) Whether it is dependent upon the existence of an agreement, or of that agreement being put into effect.

E. Description of the enforcement machinery (administrative and/or judicial), indicating any notification and registration agreements, and principal powers of body(ies).

F. Description of any parallel or supplementary legislation, including treaties or understandings with other countries, involving co-operation or procedures for resolving disputes in the area of restrictive business practices.

G. Description of the major decisions taken by administrative and/or judicial bodies, and the specific issues covered.

H. Short bibliography citing sources of legislation and principal decisions, as well as explanatory publications by Governments, or legislation, or particular parts thereof.

A. COMMENTARY BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY ON THE ACT AGAINST RESTRAINTS OF COMPETITION OF 27 JULY 1957 */

A. Description of reasons for introduction of legislation

The legislation against restrictions on competition has a relatively short history in Germany. In what was once the "classical country of cartels" - in contrast, for instance, to the United States of America - it was still taken for granted at the beginning of this century that contractual restrictions on free competition in the form of cartels were quite acceptable as an element of free trade. This basic attitude to contractual restrictions on competition was still accepted by the legislature in the Weimar Republic; the 1923 Ordinance against the Abuse of Economic Power (Cartel Ordinance) simply covered certain types of abuse but did not forbid cartels generally.

After the Second World War a general ban on cartels and monopolies was introduced into Germany for the first time in 1947 by the Allied Decartelization Laws. Immediately afterwards work began on German legislation against restrictions on competition. It drew on the work of the "neo-liberal (Freiburg) school", whose leading representatives (Eucken, Böhm, Hayeck, Miksch, Roepke, Rüstow and others) had laid the theoretical basis for a competitive system which also contains the obligation for the State to take action against positions of excessive economic power and collective restrictions on competition. The Federal Republic's first Minister of Economics, Ludwig Erhard, fought hard on the political level for the implementation of these principles. Before the legislation on restrictions on competition was finally passed in 1957 protracted discussion was necessary with the various interest groups and considerable modifications had to be made to the original concept in the draft.

The Act against Restraints of Competition (ARC) has laid the foundation for promoting and safeguarding the market economy system. The Act serves to secure the freedom of competition and to remove economic power where the effectiveness of competition and its inherent tendency to improve performance is impaired and the best possible supply to consumers jeopardized.

The Act starts out from the economic policy experience that has been confirmed by economic research that a competitive economic system is a guarantee for consumers obtaining supplies adequate in quality, quantity and price. An economic system characterized by competition is the most economic and democratic form an economic system can take. The State is called upon to control market processes only to the extent necessary to preserve the market mechanism or supervise markets in which the market form of free competition is unattainable.

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*/ The designations employed in this commentary are those of the Government of the Federal Republic of Germany.

B. Description of objectives of the legislation and the extent to which they have evolved since introduction of the original legislation

The Act against Restraints of Competition, as can be gathered from its name, is designed to prevent enterprises from restricting competition. This means that the provisions of the ARC apply to any form of private economic activity but not to sovereign measures (laws, orders, decrees, etc.) by the Federal Government, the Länder, the local authorities, and other bodies incorporated under public law. The ARC covers restrictions on competition through contractual agreements (e.g. cartels, vertical price fixing), through co-ordinated action or corresponding recommendations, but it can also cover actual practices (e.g. a call for a boycott). Enterprises which dominate a market, as they are not subject to the control of effective competition, are subject to special control to prevent abuse and to a ban on discrimination. To prevent the markets being rendered ineffective through excessive concentration of enterprises, the legislation also provides for control of mergers.

For the implementation of these aims the Act contains bans, powers of veto for the Cartel authorities and notification requirements; it provides for possibilities of exemption and claims for compensation under the Civil Code and lays down regulations on fines. This integrated system of bans, sanctions and approval possibilities serves, in accordance with the preamble to the draft legislation against restrictions on competition, to ensure "freedom of competition and remove economic power where the effectiveness of competition and its inherent tendency to improve performance is impaired and the best possible supply to consumers jeopardized".

Since coming into effect on 1 January 1957, the ARC was amended in 1966, 1973, 1976 and 1980 to allow adjustment to changing economic conditions.

Basically, the amendments served

- in 1966

  to tighten supervision of abuses by market-dominating enterprises;

- in 1973

  to introduce preventive merger control; to further tighten abuse supervision; to ban resale price maintenance; to ban concerted practices; to facilitate co-operation (among small and medium-sized enterprises);

- in 1976

  to improve the criteria for intervention in the case of newspaper mergers;

- in 1980

to extend preventive merger control; to introduce additional presumptions of market domination in the case of conglomerate and vertical mergers and to improve coverage of situations where oligopolistic positions of importance to the overall economy are strengthened; to tighten supervision of abuses by market-dominating enterprises; to raise the administrative fines imposable for violations of the Act.

C. Description of the practices, acts or behaviour subject to control, indicating for each:

(a) The type of control - for example, outright prohibition, prohibition in principle, or examination on a case-by-case basis

In German competition law a distinction is made between threats to competition from restraints on the one hand and unfair methods of competition on the other.

The protection of fair competition is the principal objective of the Act against Unfair Competition which was passed as early as 1909 and has been amended several times since. On the one hand, it contains a catch-all clause proscribing acts contra bonas mores done in the course of business activities for purposes of competition; on the other hand, it defines a number of offences, including, in particular, "misleading advertising".

Together with several other laws and ordinances, the Unfair Competition Act mainly deals with consumer protection tasks. The sanctions provided for are mainly those available under civil law, such as actions for injunctions or damages, but in some instances criminal or administrative fines may also be imposed. Enforcement of the Unfair Competition Act is therefore sought predominantly in civil suits and is outside the province of the competition authorities.

The competition authorities are rather assigned the exclusive task of protecting the freedom of competition as an institution against restraints. Therefore, it is their task to apply the Act against Restraints of Competition (ARC) which, besides numerous prohibitions and powers of intervention and control, also provides for actions for injunctions and damages in some cases.

The individual forms of restraint caught by the ARC and the control or sanctions available are shown in the following schematic outline:

Federal Republic of Germany

Restraints of competition covered by the ARC	Forms of control
I. Restraints of competition by agreements 1. Horizontal agreements ("cartels") In principle, all agreements between competitors made for a common purpose, in so far as their implementation restricts competition and thereby has a perceptible influence on market conditions (general ban on cartels, section 1).	Such agreements are of no effect under civil law, section 1; The cartel authorities may, by a binding decision, prohibit the implementation of the agreements, section 37 (a) (1) (mainly applied in cases where it is disputable from a legal point of view whether the conditions of the agreement being of no effect are satisfied); Implementation of the agreement constitutes an offence which the cartel authorities may (but need not) punish by imposing administrative fines on the participating enterprises and their agents of up to DM 1 million or, if this amount is higher, of up to three times the additional receipts obtained as a result of the infringement, section 38 (1), No. 1 in connection with (4); Those participating in the agreement are liable to pay damages to any person sustaining a loss as a result of the infringement, section 35 (1).
Certain cartels defined in sections 2-8 may be legalized. The criteria for legalization are, in general, the subject-matter and purpose of the agreement or, in one case, also the size of the participating enterprises, while in another case overriding aspects of the overall economy and the public welfare (e.g. health protection) may be taken into account. Due to the different competitive concerns raised by the various cartels qualifying for exemption, legalization procedures differ as regards the extent of control (see right-hand column).	Legalization (for details of procedure see below).
The different types of cartel that may be legalized are: (1) So-called "notification cartels": (a) Cartels dealing with the uniform application of standards or types, section 5 (1). (b) Cartels relating to the standardization of bids, section 5 (4). (c) "Pure" export cartels that does not affect competition of the domestic market, section 6 (1).	Legalization by mere notification with the cartel authority; the notification must include particulars of the cartel members as well as the subject-matter and purpose of the agreement; in the case of standardization agreements, the notification must include the comments of a so-called rationalization association. Pure export cartels may be prohibited if they violate international treaties accepted by the Federal Republic of Germany or if they substantially impair the national predominating foreign trade and payment interests.

Restraints of competition covered by the ARC	Forms of control
(2) So-called "objection cartels": (a) Cartels dealing with terms and conditions, section 2; agreements on general business terms (not including prices!). (b) Rebate cartels, section 3 Rebate must be compensation for services rendered, therefore aggregate rebate cartels cannot be legalized because they only reward the size of the enterprise that is granted the rebate. (c) Specialization cartels, section 5 (a); e.g. division of the range of products among the cartel members in order to increase output and to lower unit costs. (d) Small-business cartels, section 5 (b): efficiency-increasing co-operation among small- and medium-sized enterprises by the joint rationalization of economic activities (e.g. joint selling).	Legalization of such cartels also requires notification and becomes effective after three months, unless the cartel authority objects to the cartel within that period; in the case of cartels dealing with terms and conditions, the comments of the suppliers and customers involved of the cartel members must be attached and, in the case of rebate cartels, the comments of the economic stages affected by the rebate arrangements.
(3) Legalized "notification cartels" and "objection cartels"	After being legalized, "notification cartels" and "objection cartels" are subject to abuse supervision pursuant to section 12, under which the cartel authorities may declare the agreements concerned to be of no effect if certain conditions are met, so that the legalization is revoked and the general ban on cartels applies.
(4) So-called "authorization cartels": (a) Rationalization cartels, section 5 (2) and (3): (a) Simple rationalization cartels, section 5 (2): any kind of efficiency-increasing joint rationalization measure (except for those mentioned in (b)), unless the participants are mostly small- and medium-sized enterprises. (b) Complex rationalization cartels, section 5 (3): rationalization measures as mentioned in (a) above, connected with price agreements and/or common purchasing or selling agencies. (b) Export cartels that also regulate competition on the domestic market, section 6 (2) (c) Import cartels, section 7 The cartel may only regulate importation itself, it must not cover domestic distribution channels.	Legalization only through authorization of the cartel by the cartel authority upon application by the members; as a rule, authorization is granted for three years but may be extended by up to three years; the authorization may be connected with restrictions or conditions and under certain circumstances may or even must be revoked (for details see section 11). In the case of complex rationalization cartels, import cartels, crisis cartels, and cartels that may be authorized by the Federal Minister of Economics, it is within the discretion of the authorities to grant authorization; in all other cases, authorization must be granted if the conditions of legalization are met. Export cartels with effects on domestic markets are prohibited if they infringe international treaties or if they lead to a substantial restraint of competition within Germany.

Restraints of competition covered by the ARC	Forms of control
(d) Crisis cartels, section 4 Joint adjustment of capacity in the case of a decline in sales due to a lasting change in demand; applies only to industry (not to the trade and service sectors). (e) So-called "Minister's cartels", section 8 The Federal Minister of Economics may authorize cartels in cases where the conditions of legalization under sections 2-7 are not satisfied, if it is necessary to tolerate the restraint of competition for overriding reasons connected with the economy as a whole or with non-economic issues of the public welfare or if there is immediate danger to the continued operation of a majority of enterprises of an economic sector which cannot be obviated otherwise.	
2. Vertical agreements Agreements which are not concluded between competitors but between enterprises at different market stages and which therefore differ from horizontal agreements in that they do not serve a common purpose of the contracting parties but the balancing of basically contrary interests (so-called "exchange agreements"), a classic example being contracts of sale between a manufacturer and a trader. The ARC covers such vertical agreements only in so far as they restrict the freedom of competitive action of either side, and depending on the type and purpose of that restriction there are different forms of control. In detail: Ban on: (1) Resale price maintenance agreements: (a) Principal rule, section 15 Agreements which restrict at least one party (mostly the buyer) in its freedom to determine prices or terms of business in contracts with third parties. (b) Exemption, section 16 Resale price maintenance (within the meaning of (1) above) on publications.	The legal consequences are largely the same as those of the cartel ban: ineffectiveness under civil law; the cartel authorities may prohibit the implementation of the agreement and impose administrative fines; injured parties may raise civil-law claims for damages; the difference is that such agreements cannot be legalized and are therefore "null and void" (in distinction from being of "no effect"). In principle admissible, but subject to control for abuses is the resale price maintenance on publications: the cartel authority may on its own motion, and must upon application by a bound enterprise, declare a price maintenance agreement to be of no effect under section 17 and forbid its implementation, if the price maintenance system:

Restraints of competition covered by the ARC	Forms of control
	- Is operated abusively (in particular if it is incomplete or discriminatory); or, - In a manner not justified by the overall economic situation, leads to an increase in prices or restricts the production or sale of the goods concerned. Non-compliance with the cartel authority's order is an offence punishable by an administrative fine.
(2) Other vertical agreements: (a) Agreements under section 18 - Restrictions on the use of supplied or other goods and services; - Exclusive dealing agreements; - Restrictions on selling; - Tying arrangements.	In principle admissible, but subject to control for abuses: The cartel authority may declare the agreement to be of no effect and forbid its implementation, if the agreement unfairly restricts a significant number of enterprises in a market, unfairly restricts market entry by other enterprises, and substantially impairs competition in the market.
(b) Agreements concerning the acquisition or licensing of patents and similar protected rights, sections 20, 21. This covers: - Patents as defined in the Patents Act; - Utility models as defined in the Act on Utility Models; - Protected seed varieties; - Trade secrets (unprotected technological know-how); - Plant varieties.	Such agreements are, in principle, of no effect (with the same legal consequences as are connected with the ban on cartels), in so far as acquirers or licensees are restricted as regards the use of the patent, etc. beyond the scope of the protected right. This does not apply to certain restrictions listed in the Act (section 20 (2)). In cases other than those mentioned in that subsection the cartel authority may legalize the agreement by granting an authorization (section 20 (3)).
II. <u>Prohibitions against circumvention of the Act</u> The restrictions mentioned under I. have in common that they are caused by contractual agreements. In practice, the same restrictive effects can also be brought about by means other than legally binding agreements between the parties involved. Such means of circumvention are covered by the following provisions:	

Restraints of competition covered by the ARC	Forms of control
1. Section 25 (1) Concerted action which must not be made the subject-matter of an agreement under section 1 (ban on cartels) or which would be of no effect under sections 15, 20, 21 (prohibition of certain vertical restrictions), where the parties, while not committing themselves to specific conduct (e.g. as regards pricing), consciously make their behaviour dependent on each other's conduct and thereby exclude the risk typically connected with competition, i.e. uncertainty as to the behaviour of competitors and the other side of the market.	Statutory ban; in addition, power of the cartel authority to issue a prohibition decision, non-compliance with which may be punished by an administrative fine.
2. Section 25 (2) Exertion of economic pressure by threatening disadvantages (e.g. refusal to deal) or promising or granting advantages (e.g. rebates) in order to induce other enterprises to adopt conduct which must not be made the subject-matter of an agreement under section 1, or which would be of no effect under sections 15, 20 (1) or 21 or pursuant to a decision of the cartel authority under sections 12, 17 or 18.	The same legal consequences as in the case of concerted action: Statutory ban; in addition, power to issue a prohibition decision, possibility of imposing administrative fines.
3. Section 25 (3) Coercion of other enterprises (e.g. by predatory pricing) to induce them: - To join a cartel that may be legalized or has been legalized (or is exempted from the Act); - To merge with other enterprises; - To act uniformly in the market with intent to restrain competition.	The same legal consequences as in the case of concerted action or exertion of economic pressure; this is meant to be a safeguard that even participation in admissible restraints of competition is voluntary.
4. Recommendations, section 38 (1), Nos. 11 and 12 (a) Recommendations causing uniform conduct which must not be made the subject-matter of an agreement under the Act or which is prohibited by a decision of the cartel authority, thus circumventing the prohibition of the agreement, section 38 (1), No. 11. (b) Price recommendations, section 38 (1), No. 12.	Subject to statutory ban, constituting an offence punishable by an administrative fine.

Restraints of competition covered by the ARC	Forms of control
(c) Exemptions:	
(a) From the general ban on recommendations under section 38 (1), No. 11: recommendations whose subject-matter is similar to cartels that may be legalized under sections 2, 5 (1) or 5 (b).	In principle admissible; Recommendations of standards and types and general business terms require notification; the cartel authority may prohibit each of the three types of recommendation if the conditions of exemption are no longer satisfied or if they constitute an abuse, the legal consequences of the general ban on recommendations then taking effect again (see above).
(b) From the prohibition of price recommendations in section 38 (1), No. 12: specific resale prices of branded goods that are expressly designated as non-binding.	In principle admissible; May be prohibited by the cartel authority in the case of abuse; a preventive prohibition decision may be issued if there is danger that the abuse will be repeated.
III. Abuse of market power, sections 22 26 (2) and (3) To prevent powerful enterprises from endangering competition, the Act provides for merger control in cases where market power is created or strengthened by mergers (see below V). Market power resulting from internal growth is, however, accepted. There are no powers of ordering divestiture in cases of international growth. But powerful enterprises are subject to specific restrictions as regards their conduct which do not apply to other enterprises. In addition to the ban on discrimination (see below 2) conduct control over powerful enterprises is mainly effected through the general prohibition of abuses by enterprises whose market power has passed the threshold beyond which market domination is assumed to exist.	
1. Abuse of market-dominating positions, section 22 The Act defines market domination as lack of any or at least any substantial competition or, alternatively, as a paramount market position of an enterprise in relation to its competitors, considering, in addition to the share of the market, its financial strength, its access to the supply or sales markets and market stages, its links with other enterprises (including participations below the lower limit applicable for purposes of merger control) as well as legal or actual barriers to market entry. Enterprises are also regarded as market-dominating in the sense of oligopoly theory, if they satisfy the above conditions only together with one or several other enterprises, provided that there is no substantial competition between them.	

Restraints of competition covered by the ARC	Forms of control
In order to facilitate the establishing of market domination as defined above, the Act contains several - rebuttable - presumptions. Market domination is presumed to exist, if: - One enterprise has a market share of at least one third and a turnover of at least DM 250 million; - Up to three enterprises together have a market share of at least 50 per cent; or - Up to five enterprises together have a market share of at least two thirds, and each of them has a turnover of at least DM 100 million. In calculating an enterprise's market share and turnover, the figures of any enterprises linked to it - either controlling it, being controlled by it or being affiliated to it - are taken into account.	
The - somewhat complicated - legal definition of abuse can be summarized as follows: an abuse exists, if a market-dominating enterprise: - Unfairly hinders competitors (e.g. by charging different prices to subsidiaries on the one hand and other customers on the other, or through certain rebate systems or systematic selling below cost); - Exploits suppliers or buyers (e.g. by charging excessively high prices as a supplier or demanding excessively low prices as a buyer).	The cartel authority may prohibit a market-dominating enterprise's abusive conduct and declare any relevant agreements to be of no effect, if the enterprise concerned fails to discontinue that conduct at the request of the cartel authority; failure to comply with the prohibition decision may in turn be punished by an administrative fine and is subject to civil-law claims for damages by third parties; if neither an administrative fine is imposed nor damages are claimed and paid, the cartel authority may, once its prohibition decision has become unappealable, order the enterprise concerned to pay over to it the receipts that enterprise has obtained as a result of its abusive behaviour following service of the decision (so-called "skimming-off additional receipts"), section 37 (b).
2. Discrimination, section 26 (2) and (3) Section 26 (2) and (3) supplements the control of market power mainly by covering a wider circle of enterprises as compared with section 22 as well as additional courses of conduct. Discrimination is defined as unfair hindering of competitors (as in section 22), on the one hand, and unjustified differential treatment (i.e. discrimination in a narrower sense) of different enterprises on the opposite side of the market (suppliers and buyers), on the other, and finally as the use of buying power to obtain factually unjustified preferential terms in purchasing.	Statutory ban; The cartel authority may prohibit the discriminatory practices (e.g. in the case of refusal to deal it may order a manufacturer to supply a dealer); Administrative fines may be imposed; civil-law claims for injunction and damages may be raised against the discriminating enterprise.

Restraints of competition covered by the ARC	Forms of control
Differential treatment may, in principle, consist in a wide range of practices, but so far cases of refusal to deal have played a major role. Differential treatment, however, is only regarded as discriminatory if it is arbitrary, i.e. if it does not result from a distribution system that has been established in accordance with the principle of freedom to contract and is factually justified. Section 26 (2) therefore does not provide for a general obligation to contract. Section 26 covers, besides market-dominating enterprises as defined in section 22 and (legalized) cartels, enterprises that are "only powerful" and whose relative market power derives from the fact that other enterprises depend on business relations with them as suppliers or buyers (e.g. a specialized dealer may depend on being supplied with certain well-known brands in the television and ski markets.	
IV. Boycott, section 26 (1) The term "boycott", or more precisely, "incitation to boycott" in German law denotes action by an enterprise or an association of enterprises (e.g. a trade association) to incite another enterprise or association of enterprises to refuse to sell to, or purchase from, one or more third enterprises with intent to unfairly harm certain (competing) enterprises (the latter not necessarily being the same as the ones that are to be refused supplies or purchases). Incitation to such action suffices; it need not be successful, i.e. the enterprises at which the incitation was directed need not comply. Unlike the ban on discrimination, the provision applies to all enterprises, rather than to powerful enterprises only.	Statutory ban; in addition, possibility of issuing a prohibition decision in a particular case; offence punishable by an administrative fine; enterprises harmed by a successful boycott may bring actions for injunction and damages.
V. Mergers From among the large variety of links between enterprises, the ARC subjects the following to control: - Acquisition of at least a substantial part of the assets of another enterprise; - Acquisition of voting shares in another enterprise if this results in a share of 25 or 50 per cent of the voting capital of the other enterprise; - Acquisition of the majority of shares or voting rights in another enterprise;	1. Prohibition Subject to certain conditions, the FCO has the power and duty (no discretionary power) to prohibit mergers (see (b) below). (a) Limitations on power to prohibit a merger The FCO has no power to prohibit a merger if: - The participating enterprises record annual turnovers of less than DM 500 million; or - An independent enterprise which recorded a turnover of less than DM 4 million affiliates itself to another enterprise (voluntary merger); or

Restraints of competition covered by the ARC	Forms of control
- Where several enterprises simultaneously or successively acquire shares to the extent mentioned above, this is also deemed a merger of the participating enterprises; - Various types of corporate agreement (in particular, group agreements or agreements to transfer profits or lease a division of one's enterprise to another enterprise); - Interlocking directorates; - Bringing into existence joint control of an enterprise by at least two other enterprises by other means (e.g. agreement to pool votes). The ARC does not cover all mergers but only those of some economic importance which is expressed in market shares, turnovers and number of employees. Since the thresholds vary according to the purpose of control (notification, pre-notification, prohibition) they are described in the column to the right.	- An independent enterprise which recorded a turnover of a maximum of DM 50 million affiliates itself to another enterprise with a turnover of less than DM 1 billion; or - A market is affected in which goods or commercial services have been supplied for at least five years and which has an annual turnover of less than DM 10 million. (b) Conditions of prohibition A merger has to be prohibited if a market-dominating position is created or strengthened as a result of it, unless the merger also leads to improvements in the conditions of competition that will outweigh the disadvantages of market domination. Whether a market-dominating position exists, is determined using the same criteria as in section 22 (see III, 1 above). For merger control purposes, however, there are further presumptions (section 23 (a)) that facilitate findings of market domination of oligopolies and conglomerate mergers. It is not necessary for market domination and improvements in the conditions of competition to be present in the market where the merger occurs (which is important when multi-product enterprises participate in a merger). The FCO has to decide on the basis of the above-mentioned purely competitive aspects only, without having regard to other economic and general policy considerations. The latter have to be taken into account for the purposes of the "ministerial authorization" (see 2 below). 2. Ministerial authorization Upon application, the Federal Minister of Economics has the power and duty to authorize a merger previously prohibited by the FCO, if in a particular case the restraint of competition resulting from the merger is outweighed by advantages to the whole economy resulting from the merger or if the merger is justified by a predominating public interest. 3. Dissolution Completed mergers which have been finally prohibited by the FCO and not subsequently authorized by the Federal Economics Minister by way of exception must be undone. The FCO orders the measures necessary to dissolve the merger (e.g. divestiture of a division of an enterprise).

Restraints of competition covered by the ARC	Forms of control
	4. Notification requirements (a) Notification <u>after</u> completion, section 23 Mergers have to be notified to the FCO immediately after completion, if the participating enterprises together have: - A market share of at least 20 per cent in the Federal Republic; or - A world-wide turnover of at least DM 500 million; or 10,000 employees. As for the purposes of section 22, the figures of all enterprises corporately linked with the parties to the merger have to be taken into account. (b) Notification before completion, section 24 (a) (a) Conditions Merger projects have to be pre-notified if: - At least one of the enterprises participating in the merger has a turnover of at least DM 2 billion; or - At least two of the participating enterprises record individual turnovers of DM 1,000 million; or - The merger is to be brought about under the law of a Federal Land by legislation or any other governmental act (e.g. for savings banks). (b) Temporary ban on completion Completion before the end of a four-month period of merger projects requiring pre-notification is punishable by an administrative fine. Only within this period can the FCO prohibit pre-notified merger projects. Subject to certain conditions, the waiting period for the enterprises concerned may be shorter.

(b) The extent to which the practices, acts or behaviour in Section D, paragraphs 3 and 4, of the Set of Principles and Rules are covered by this control, as well as any additional practices, acts or behaviour that may be covered, including those covering specifically the issue of consumer protection, such as controls for misleading advertising

All practices mentioned in Section D, paragraph 3, of the Set of Principles and Rules are banned in principle by the ARC in so far as, pursuant to Section 98 (2), they have effect in the area in which the ARC applies.

The acts or behaviour mentioned in Section D, paragraph 4, of the Set of Principles and Rules - with the exception of (e) - are in principle banned by the ARC or may be declared of no effect in so far as, pursuant to Section 98 (2), they have effect in the area in which the ARC applies.

Unlike patents, utility models, and protected seed varieties (see Section 20 of the ARC), the acts mentioned in (e) are not specifically dealt within the ARC.

Some of the acts or behaviour mentioned in Section D, paragraph 4, of the Set are banned by the ARC or may be prohibited, regardless of whether they are abusive:

- the acts mentioned in Section D, paragraph 4 (c), of the Set are to be prohibited under Section 24 (1) of the ARC, if it is likely that a market-dominating position will be created or strengthened as a result of a merger;

- the behaviour mentioned in Section D, paragraph 4 (d), of the Set is forbidden under Section 15 of the ARC (an exception being provided for publications in Section 16 of the ARC, however).

The following acts or behaviour - some of which are not mentioned in Section D, paragraphs 3 and 4 - are banned by the ARC or may be declared of no effect:

- Pursuant to Section 20 (1) of the ARC, agreements concerning the acquisition or use of patents, utility models, or protected seed varieties are ineffective in so far as they impose upon the acquirer or licensee any restrictions on his business conduct which go beyond the scope of the protected right; restrictions pertaining to the type, extent, quantity, territory or period of exercise of such right are not deemed to go beyond its scope.

- Pursuant to Section 25 (1) of the ARC, concerted action of enterprises or associations of enterprises which under this Act must not be made the subject-matter of a contractual commitment are forbidden.

  Under Section 25 (2) of the ARC, enterprises or associations of enterprises must not threaten or cause harm, or promise or grant advantages, to other enterprises for the purpose of inducing them to adopt conduct which, under the ARC, or a decision issued thereunder by the cartel authority, must not be made the subject-matter of a contractual commitment.

- Pursuant to Section 26 (1) of the ARC, enterprises or associations of enterprises must not incite another enterprise or association of enterprises to refuse to sell or purchase with intent unfairly to harm certain enterprises.

- Pursuant to Section 38 (1) Nos. 11 ff. of the ARC, an offence is committed by any person who issues recommendations which, through uniform conduct, result in the circumvention of prohibitions laid down in the ARC or of decisions taken by the cartel authority pursuant to the ARC (but see exceptions provided in Section 38 (2) Nos. 1 ff, as well as Section 39 of the ARC).

  Consumer protection issues, e.g. controls for misleading advertising, are not covered by the Act against Restraints of Competition.

D. Description of the scope of application of the legislation, indicating:

(a) Whether it is applicable to all transactions in goods and services and, if not, which transactions are excluded; (scope of application as regards the subject-matter).

1. All but a few of the ARC provisions are applicable to trade in goods and commercial services, i.e. production, and processing, distributive trades and services. The few exceptions are invariably due to the character of the particular transaction rather than to the fact that any of the functions mentioned are actually exempted from the scope of the law. For example, capacity reduction agreements (so-called crisis cartels, Section 4), by the very wording of the provision, are intended only for the production or processing of goods. Similarly, restrictions on distribution (Section 18 (1) No. 3) can only relate to the trade in goods.

2. Regardless thereof, some economic sectors are wholly or partly exempt from the application of the ARC owing to their legal, functional, structural or technical peculiarities.

However, the exempted sectors as specified in Sections 99-103 of the ARC are subject to special legislation and administrative provisions, which wholly or at least partly take the place of the market mechanism, and in most cases also to additional control by special supervisory authorities.

Pursuant to Section 101, No. 1, the German Federal Bank (Deutsche Bundesbank) and the Reconstruction Loan Corporation (Kreditanstalt für Wiederaufbau) are fully exempt from the application of the ARC. As far as coal, iron and steel enterprises are concerned, the provisions of the Treaty establishing the European Coal and Steel Community take precedence over the ARC provisions (Section 101 No.3). The spirits monopoly is exempt only in so far as the provision of services or payment is regulated by law (Section 101 No. 2); the matches monopoly also referred to in Section 101 ended in 1983.

The economic sectors mentioned in the following are ony partly exempt from the application of the ARC. In the sectors of transportation (Section 99), agriculture and forestry (Section 100), credit and insurance business (Section 102) and electricity, gas and water supply (Section 103), agreements, decisions and recommendations of the enterprises or associations

of enterprises concerned, as well as those of copyright associations (Section 102a) are exempt only from some or all of the ARC bans (Sections 1, 15, 18, 38 (1) No. 11). To prevent abuses of their privileged position, however, even exempted agreements, decisions and recommendations are subject to control by the cartel authorities.

This means that action can be prohibited and agreements can be declared to be of no effect if they run counter to the purpose of the exemption (see in particular: Sections 102 (4), 102a (2), 103 (5), (6), 104, 105 of the ARC). This does not apply to agreements, decisions and recommendations in the transportation sector concerning tariffs and conditions approved by the competent supervisory authority; pursuant to Section 99 (1) of the ARC they are not subject to cartel law control.

In so far as an economic sector is ony partly exempt from the ARC, applicability of the other provisions remains unaffected. Transportation enterprises (including the Federal Railways and the Federal Postal Administration), e.g., are fully subject to abuse control under Section 22 of the ARC, merger control (Sections 23 ff. of the ARC) and the bans provided for in Section 26 of the ARC.

(b) Whether it is applicable to all enterprises and, if not, which enterprises are excluded; (scope of application as regards the persons covered).

As to the persons covered, the ARC is exclusively applicable to enterprises engaged in the private sector of the economy, and with a few exceptions (e.g. licensors, Section 20), to such enterprises only.

1. The ARC does not define the term "enterprise". However, according to the legislative intent as well as to court rulings, administrative practice and the literature, the term should be given a liberal interpretation in the light of the purpose of the legislation. Accordingly, any economic activity in the production of, or trade in, goods or commercial services that is not intended for private consumption only is considered entrepreneurial activity. Such activity need not be carried on for profit, nor is a particular legal form required. Therefore, members of the profession (doctors, lawyers, architects), sports associations (in so far as they engage in commercial transactions) and (private) health insurance companies, in particular, are also deemed to be enterprises.

2. In view of the above and according to Section 98 (1) - which to that extent merely serves as a further clarification - also State-owned enterprises as well as other public institutions (such as the postal administration, railways, social security institutions) and even the State itself are subject to the ARC in so far as:

- none of the exemptions provided in Sections 99-103 is applicable;
- the activity to be examined in a particular case consists in a private sector commercial activity rather than a sovereign act subject to public law.

Exempting the performance of sovereign tasks from the application of the ARC means, e.g. that the provision of social services, subsidies and public facilities within the framework of social or cultural and educational policy (public baths, libraries, etc.) is not subject to the ARC, whereas purchases by public authorities to meet their requirements (the State participating as buyer in the market) and above all - even direct - State shareholdings in enterprises are subject to the ARC, which is of great importance to merger control. Statutory health insurance institutions as part of the social security system are not subject to the ARC in so far as they give curative treatment to the insured; however, as buyers in the market for the necessary remedies (e.g. pharmaceuticals, and appliances such as spectacles, dentures, etc.) they are subject to the ARC.

(c) Jurisdictional reach of the legislation in terms of control, e.g.

Whether applying to all practices, acts or behaviour having effects on the country, irrespective of where they are committed; (territorial scope of application).

It is the exclusive task of German competition law and of the authorities charged with its application to protect competition within the territory of the Federal Republic of Germany. The restriction of the jurisdictional reach to the domestic territory does not reflect conscious self-restraint, but is explained by the fact that for international law and administrative practice reasons it is not possible for the German lawmaker to regulate competitive conditions abroad nor for a German competition authority to conduct investigations abroad. However, since in the course of international trade domestic competition may be affected not only by domestic practices, but also by practices carried on abroad, the German lawmaker in Section 98 (2) adopted the so-called effects doctrine for the purpose of defining the territorial reach of the Act (see paras. D, (c) (ii) of the Format). According to Section 98 (2) the Act applies to all acts or practices in restraint of competition which have effect in the German domestic market, and such acts and processes only, regardless of whether they are done or caused in the Federal Republic or abroad. To avoid international law conflicts, this has been further clarified by court decisions according to which the ARC is applicable to restraints of competition caused abroad only in so far as they have effect in the territory of the Federal Republic of Germany. This means, e.g. that a merger completed abroad cannot be prohibited as such in its entirety, but only in so far as it results in a combination of the resources of the domestic subsidiaries of the enterprises participating in the merger (so-called partial prohibition).

E. Description of enforcement machinery (administrative and/or judicial), indicating any notification and registration agreements, and principal powers of body(ies)

The Federal Cartel Office (FCO) is an independent higher Federal authority responsible to the Federal Ministry of Economics. The Act against Restraints of Competition (ARC), which was enacted for the protection of competition, forms the legal basis of the FCO's activities.

The FCO has jurisdiction over all restraints of competition which have effect in the area in which the Act applies (Section 98 (2) of the ARC) and

extend beyond the territory of a Federal Land (Section 44 of the ARC). Where restraints in competition have effect within one Federal Land only, the Land cartel authority concerned is, in principle, the competent authority. Over certain restraints of competition (e.g. merger control) the FCO has sole jurisdiction.

To enforce cartel law, the FCO has extensive investigatory powers (Section 46 of the ARC). It may request information from enterprises, inspect business documents and, pursuant to an order by local court, search enterprises and seize evidence.

Proceedings before the FCO are instituted upon application or on the FCO's own motion (Section 51 of the ARC). The decisions of the FCO are made in the decision divisions by a body consisting of a chairman and two other members (Section 48 of the ARC).

The ARC provides for three different kinds of proceeding. Two types of proceeding are instituted by the cartel authorities, and one by the enterprises. Administrative proceedings of the cartel authorities serve to legalize restraints of competition that are admissible under the ARC if certain conditions are met. Administrative proceedings are also used to examine restraints of competition and to eliminate them by means of a prohibition decision if authorization or exemption under the Act is not possible (for details see answer to C (a)). Administrative offence proceedings may be instituted by the cartel authorities against certain restraints of competition which in the ARC are declared to be administrative offences (Sections 38, 39 of the ARC) and which are punishable by administrative fines. The cartel authority may impose administrative fines of up to DM one million for infringement of the prohibitions of the ARC. Alternatively, fines of up to three times the additional receipts obtained as a result of the infringement may be imposed. Finally, Section 35 offers enterprises a possibility of bringing civil law actions for damages and injunction against enterprises that have infringed provisions of the ARC which are deemed to be protective law.

The legalization of certain cartels and merger control involve the notification of the project or transaction concerned. Section 1 of the ARC contains a general ban on cartels. Under certain conditions, the cartel authority may, however, exempt the following types of cartel from the prohibition:

Condition-fixing cartels	(Section 3)
Rebate cartels	(Section 4)
Crisis cartels	(Section 4)
Rationalization cartels	(Section 5)
Specialization cartels	(Section 5a)
Co-operation cartels	(Section 5b)
Export cartels	(Section 6)
Import cartels	(Section 7)

Administrative proceedings for the legalization of cartel agreements are initiated by notification (e.g. under Sections 2, 3) or by filing an application for authorization (e.g. under Sections 5 (2), 6 (2)) with the cartel authority. In the case of cartel agreements under Section 5 (1), (4),

Section 6 (1), the administrative proceeding is closed as soon as the notification has been duly made. If a case raises substantive law concerns, an abuse proceeding must be instituted. Cartels as defined in Sections 2, 3 and 5a, which become effective unless the cartel authority objects to them, must be examined within a period of three months. In deciding on the authorization of cartels under Section 4, Section 5 (2) and (3), Section 6 (2) and Section 7, the cartel authority need not observe a time limit.

The merger control provisions cover completed mergers - which must immediately be notified to the FCO - as well as merger projects. The latter may be notified to the FCO by the participating enterprises prior to the completion of the merger; in specified cases they must be notified in advance. By the Fourth Act to Amend the ARC, the duty to notify merger projects has been substantially extended. They now have to be notified to the FCO, if:

1. One of the enterprises participating in the merger recorded a turnover of at least DM 2,000 million in the last completed business year; or

2. At least two of the enterprises participating in the merger each recorded a turnover of DM 1,000 million or over in the last completed business year; or

3. The merger is to be brought about under State law by legislation or other governmental act.

The duty of notification as described above does not arise if a merger is exempted from merger control under Section 24 (8). This is the case in particular if an enterprise which is not controlled by another and which recorded a turnover not exceeding DM 50 million in the last completed business year merges with another enterprise, unless the acquired enterprise had a turnover of at least DM 4 million and the acquiring enterprise a turnover of at least DM 1,000 million. However, also in such cases the merger has to be notified to the FCO after it has been completed. Unlike the notification of completed mergers, the pre-notification of merger projects is subject to a fee. The notification, which must be effected also in the case of prenotified merger projects after they have been completed, is published in the Federal Gazette (Bundesanzeiger) in respect of such data as firm name, registered office and type of business, as well as form of the merger (Section 10 (1) No. 5 of the ARC).

If the conditions of Section 24 (1) are satisfied, the FCO has to prohibit mergers. In doing so, it has to observe certain time-limits, i.e. one year for notified mergers and four months for notified merger projects. The periods can be extended in agreement with the enterprises involved, and they begin to run upon receipt of the complete notification of the merger or the merger project at the FCO.

Any party to the proceedings before the FCO may lodge an appeal from the decisions of the FCO with the Berlin Court of Appeals, and against decisions of the latter, an appeal on points of law may be filed with the Federal Supreme Court (Sections 62 ff. and 73 ff. of the ARC). Upon application, the Federal Minister of Economics may authorize mergers that have been prohibited

by the FCO, if the restraint of competition in the particular case involved is outweighed by advantages to the whole economy resulting from the merger or if the merger is justified by a predominating public interest; in this respect, the competitiveness of the participating enterprises in markets outside the area of application of the ARC must also be taken into account.

At present, the FCO has a staff of 232, 109 are senior rank officials and employees, half of them being lawyers and half economists.

Besides the FCO, the Monopolies Commission is charged with looking into anti-competitive developments (see Section 24b of the ARC). The Monopolies Commission, located in Cologne, is an independent advisory body whose members are appointed by the President of the Federal Republic on a proposal by the Federal Government. The Commission is composed of five members who must have special knowledge and expertise in the fields of economics, business administration, social policy, technology or commercial law. The Monopolies Commission has no decision-making power of its own. It issues, every two years, a report on the trend of business concentration and the application of the provisions relating to the supervision of market-dominating enterprises for abuses and to merger control. It also gives opinions in cases where an application for authorization of a merger by the Federal Minister of Economics has been made.

F. Description of any parallel or supplementary legislation, including treaties or understandings with other countries involving co-operation of procedures for resolving disputes in the area of restrictive business practices

Besides the ARC, there are the following supplementary laws regulating acts and behaviour relevant to competition:

- Act against Unfair Competition;
- Rebates Act; and
- Gifts Order.

Due to limitation on documentation, however, the supplementary laws could not be reproduced. They are available with the UNCTAD secretariat and can be made available upon request.

The Federal Republic of Germany concluded an agreement relating to mutual co-operation regarding restrictive business practices with the United States of America in 1976, and with France in 1984.

G. Description of the major decisions taken by administrative and/or judicial bodies, and specific issues covered

I. Ban on cartels

1. Zementverkaufsstelle Niedersachsen (ZVN), BGH 19/6/75, KVR 2/74

Selling agencies

The Federal Supreme Court confirmed that agreements that are not expressly made for the purpose of restricting competition but nevertheless intend to do so may violate the ban on cartels.

The Federal Supreme Court ruled that the co-operation among six cement manufacturers of Lower Saxony in a joint selling agency constitutes a violation of Section 1 of the Act against Restraints of Competition. To implement the task laid down in the contract of association, namely the selling of cement, the joint selling agency had concluded agreements on distribution and supply with its members. Thereafter the joint selling agency sold the contract goods in its own name and on its own account, but granted the respective supplier the most favoured treatment. The contract of association expressly excluded the obligation to tender. In so far as the members sold their products through the joint sales agency, the purchasing prices of the latter were the same in respect of all members.

The Federal Supreme Court found that the parties to this agreement on co-operation had agreed that the contract was to bring about the elimination of price competition among the parties. This type of agreement did not require the obligation to tender. In lieu of such obligation there was the common expectation of commercially sound conduct by each party in line with the common objective, for having regard to the intended purpose sufficient sales could be expected for the joint selling agency. By this decision the Federal Supreme Court has extended the scope of application of the ban on restraints of competition under Section 1 of the Act to include forms of co-operation so far permissible under cartel law.

2. Handelsgesellschaft freier Gross- und Einzelhandelsbetriebe mbH (HFGE), KG 16.6.82, Kart 7/82

Purchasing associations

The Berlin Court of Appeals confirmed that the ban on cartels is also applicable to traders' purchasing associations that restrict competition.

The FCO had for the first time prohibited a purchasing association of four important food retailers from combining and concentrating a substantial part of their purchases.

By its decision of 16 June 1982, the Berlin Court of Appeals upheld the FCO's decision, thus further clarifying questions of how to judge purchasing associations of the trade in terms of competition law. In view of the variety of actual and legal possibilities of organizing purchasing associations, the circumstances of each individual case have to be considered. The Court noted, however, that such associations are subject to the ban on cartels, if they satisfy the following conditions:

- If the contractual co-operation is designed in such a manner that long-term adequate purchases by each individual member through the association are to be anticipated;

- If the collective buying behaviour restricts competition for the most favourable terms, which also exists among buyers. This is the case where the individual member is able to also make individual business deals outside the framework of a purchasing association;

- If, in addition, the collective action of the members is likely to affect the market position of the supplying side perceptibly; this depends on the "general market situation" as well as, in particular, on the members' "joint buying potential".

The required "inevitability" of collective action will, as a rule, be present only where there is a small number of association members which are about equal in size. The joint objective of enforcing more favourable terms could be achieved only if the members were willing to largely give up any individual purchasing negotiations for the products in question, the Court found. If there are only four members of about the same size, independent action by only one member results in essentially reducing the total purchasing quantity and thus in drastically minimizing the benefit. Therefore, all members have a vital interest in collective action.

The Berlin Court of Appeals' decision is final.

II. Ban on discrimination

Nordmende, BGH 17.1.79, KZR 1/78

Telefunken, BGH 23.10.79, KZR 19/78

Revell Plastics, BGH 26.6.79, KZR 7/79

Modellbauartikel I, BGH 8.5.79, KZR 13/78

Modellbauartikel II, BGH 24.9.79, KZR 20/78

Rossignol, BGH 20.11.75, KZR 1/75

Requirements to be met by modern forms of distribution in order to be supplied by branded goods manufacturers. In a number of decisions, the Federal Supreme Court has clarified the relationship between industry and distributive trades as regards the structuring of distribution channels.

In the six above-mentioned decisions dealing with the enlarged ban on discrimination under Section 26 (2), handed down in 1979, the Federal Supreme Court further defined the scope of application of that provision. Thus, it has been made clear, above all by the Court's decision in the "Allkauf/Nordmende" case, that modern forms of trade fulfil the same economic function as the traditional specialist trade and may be dependent on branded goods manufacturers to the same extent as the latter. As regards the element of dependence, the Court went beyond the "Rossignol" decision and held that a retailer can be dependent on several competing branded goods manufacturers if he has to carry a number of generally accepted trademarks in order to be competitive.

These principles were confirmed by a further Federal Supreme Court judgement (Plaza/Telefunken case). Supplementing the above-mentioned decision, the Court held that the dependent retailer is required neither to bring action against all suppliers coming under the legal provision concerned nor to observe a specific order among those suppliers. The Court furthermore

pointed out that the fact that the retailer customer belongs to a powerful group does not preclude dependence within the meaning of Section 26 (2), sentence 2, of the ARC and can only be considered in determining whether the refusal to sell is factually justified.

In another decision (Revell Plastics) the Federal Supreme Court denied that a retailer was dependent on the largest supplier on the ground that, according to the findings of the trial court, the customer, although sufficient alternatives were available, had made no effort to build up an extensive range of goods. Developing the above-mentioned statements on dependence, the Court held that an enterprise which newly enters the market or wants to expand its operations may in principle claim protection under Section 26 (2). This protection had, however, to be denied where the enterprise in opening up a business or extending its range of goods did not try to obtain a complete range but restricted itself to carrying such goods which held a top position (fast-selling articles).

In two decisions concerning model building articles (Modellbauartikel I + II) the Federal Supreme Court held that a mail-order house was dependent on the three leading manufacturers because all the wholesalers operating in that market had discontinued their supplies to the enterprise concerned. On the issue of "similarity", the Court stated with regard to trade in model building articles that the specialist mail-order trade is similar to the stationery specialist retail trade as far as the entrepreneurial activity and economic function are concerned.

III. Merger control

1. GKN-Sachs Automotive clutch business (BGH 21.2.78, KVR 4/77)

First prohibition under merger control provisions to be based on an increase in financial strength of the participating enterprises without their being engaged in the same market. FCO findings confirmed by Federal Supreme Court.

In May 1976, the FCO prohibited the proposed sale to the British group, Guest, Keen & Nettlefolds Ltd. (GKN) of 74.99 per cent of the share capital of Sachs AG, Munich, by the brothers, Ernst Wilhelm and Gunter Sachs. Sachs AG is the holding company of the Sachs group which consists of a number of companies, including Fichtel and Sachs AG (F & S), Schweinfurt. In the Federal Republic of Germany, GKN already held a majority interest in Unicardan AG, Lohmar.

In the FCO's opinion, the Sachs-GKN merger had to be prohibited, because it was likely that the market-dominating poisition of F & S as a supplier of automotive clutch components to the vehicle industry would be strengthened as a result of the merger. In this field F & S held a market share of approximately 80 per cent and hence a paramount position in relation to its only competitor, LuK - Lamellen- und Kupplungsbau GmbH, Bühl. The FCO argued that it was irrelevant in this context that the automobile industry had a strong buying power position. The industry's own clutch production was rather insignificant. Even if it was added to the market output, F & S would still hold more than two thirds of that market.

According to the FCO's opinion, the proposed Sachs-GKN merger was expectd to strengthen the market-dominating position of F & S due to the fact that Sachs AG, with an annual turnover of approximately DM 1,000 million, would in future belong to the GKN group with its much greater financial strength (1974 turnover in excess of DM 6,000 million).

The considerably increased financial strength of the combined enterprises would allow F & S a wider scope of action in relation to its actual or potential competitors. In particular, market access would be rendered more difficult for newcomers, because after completion of the merger, new entrants would be faced with a substantially increased defence potential on the part of the market-dominating enterprise F & S.

On appeal, the Berlin Court of Appeals on 1 December 1976 overruled the FCO's prohibition decision mainly on the ground that an increase in financial resources would not automatically lead to the strengthening of a market-dominating position. Rather, it had to be shown in each case that competitive effects by the use of these resources were highly likely. It was ruled that in the GKN/Sachs case a strengthening of the market-dominating position could not be expected, because Sachs AG already owned considerable financial resources prior to the merger.

The Federal Supreme Court, in its decision of 21 February 1978, did not follow the Berlin Court of Appeals but confirmed in essence the findings of the FCO. The Supreme Court reasoned that the effects of the merger on actual or potential competition, produced by the additional financial strength and links with the highly diversified British group, would be that, because of the already great lead of Sachs AG in the market, the reduced but still possible commpetitive reaction would completely cease to take place; at any rate, the chance for a revival of competition would be substantially reduced. According to the Federal Supreme Court, these effects would result in an increase in the market-dominating position of Sachs AG. Prohibition of the merger was therefore held to be justified.

2. Philip Morris/Rothmans (KG 1.7.83, Kart 16/82)

FCO's possibility of intervention in the case of mergers completed abroad, but having domestic effects.

Following the acquisition in April 1981 by Philip Morris, Inc., New York, of 50 per cent of the voting capital in Rothmans Tobacco (Holdings) Limited, London, the FCO had prohibited this merger as far as this acquisition had effects within the territory of the Federal Republic of Gemany. The Berlin Court of Appeals, following the oral hearing on 16 June 1983, had partially changed the wording of the decision of the FCO on grounds of international law and revised it as follows: "The merger between Philip Morris GmbH and Martin Brinkmann, which has been effectuated through the acquisition by Philip Morris Inc. of 50 per cent of the voting capital of Rothmans Tobacco (Holdings) Limited, is prohibited. The appeals are dismissed on all other points". This means that the prohibition relates only to the merger that - in connection with the overall transaction - has been completed on the territory of the Federal Republic of Germany. As to the difficulties of how to dissolve this international merger at a later stage in case of final prohibition, the Court of Appeals confirmed the FCO's view that the prohibition only created

the legal foundation for the subsequent dissolution of the merger, but did not presuppose that there is already clarity with regard to the various measures to be taken with due regard to the then prevailing circumstances and to the protection of third party interests. Whether a dissolution measure considered by the FCO was possible and admissible, would be the subject of a subsequent review in a separate administrative proceeding (Section 24 (6) of the ARC) and, if necessary, in an ensuing legal proceeding.

In December 1983, all parties involved in the merger as well as the FCO lodged appeals with the Federal Supreme Court. In order to remove the objections of the FCO against this merger, Rembrandt Group Ltd. and Philip Morris, Inc. agreed early in 1984 to divest and restructure their interests. Consequently Philip Morris acquired a capital interest in Rothmans International, Plc, of about 30 per cent, while the voting power of Philip Morris was reduced to under 25 per cent.

According to the restructuring, the links between Philip Morris and Rothmans Tobacco (Holdings) Ltd. would be completely eliminated. The Rembrandt Group would then again be the single owner of the Rothmans Tobacco (Holdings) Ltd. Also, no representative of Philip Morris would be appointed to the Board of Rothmans International, Plc.

The FCO took the view that the restructuring of the merger would not result in a competitive relationship as before the merger. Rather, the merger would still fulfil the criteria of the German merger provisions (Section 23 (2) No. 2a of the ARC) and would still limit competition between the two German companies, Martin Brinkmann and Philip Morris GmbH.

3. Burda/Springer (BKartA 23.10.81, B 6 - 47/81)

Possibilities and limitations of merger control in the press sector.

The FCO prohibited Burda Verwaltungs KG, which has links with the publishing house Burda GmbH, of Offenburg, from acquiring a share in Axel Springer Gesellschaft für Publizistik KG. Burda is the fourth largest and Springer the largest German press group. As a result of the merger, market-dominating positions would be obtained in the press distribution, advertising and magazine printing markets by the totality of enterprises leading in these markets which include Burda and Springer.

Springer's paramount position, inter alia, in the markets for radio and TV programme magazines and Sunday papers would be strengthened, in partiuclar as a result of the additional market power of the enterprises concerned. The enterprises had filed an appeal with the Berlin Court of Appeals and applied for an authorization by the Minister of Economics. The Monopolies Commission in the opinion requested by the Federal Minister of Economics had advised against authorizing the merger on the grounds that the project would endanger competition and the plurality of opinion in the press sector. In consideration of this clear opinion, the enterprises withdrew their application from the Ministry of Economics. At the same time Burda reduced the planned acquisition to a 24.9 per cent share of the voting capital of Springer.

As a rule a merger only comes under the control of the FCO when the shares alone or together with other shares already held by the acquiring enterprise amount to 25 per cent of the voting capital of the other enterprise (Section 23 (2) No. 2a of the ARC). After carefully looking into the contractual agreements and the structure of the Axel Springer Verlag, the FCO came to the conclusion that this reduced acquisition even when seen in conjunction with the contracts and articles of association did not fall in any other way under the merger control provisions.

4. Rewe/Florimex (KG 22.3.83, Kart 17/81)

Merger control used to protect markets comprising small- and medium-sized enterprises.

In the Rewe/Florimex case the Berlin Court of Appeals confirmed the decision of the FCO prohibiting Rewe Zentral-Handelsgesellschaft, a subsidiary of Rewe Zentral AG, Cologne, from acquiring 50 per cent of the voting shares of Florimex Verwaltungsgesellschaft, Nuremberg. The Florimex group is a world-wide operating wholesaler in cut flowers and is by far the biggest enterprise in the German flower market. The Court confirmed the view of the FCO that the merger would result in the paramount market position of the Florimex group being further strengthened at the expense of its solely small- and medium-sized competitors. The decision of the FCO was the first to be based on the "presumption of penetration" which was introduced by the Fourth Act to Amend the Act against Restraints of Competition, and is intended to prevent greater penetration by large enterprises into markets made up of medium-sized enterprises. The decision is final.

H. Literature

Act against Restraints of Competition and Written Report on the Draft Legislation by the Bundestag Committee for Economic Policy, published in WuW-Schriftenreihe, No. 5, Dusseldorf 1957.

The current version of the Act against Restraints of Competition was published in Legal Gazette 1974, part I, p. 869 ff. as amended by the Third Act to Amend the ARC of 1976 ("Merger Control in Respect of the Press Sector" - Legal Gazette 1976, part I, p. 1761) and the Fourth Act to Amend the ARC of 1980 (Legal Gazette 1980, part I, p. 458).

Monopolies Commmission: 1st Regular Report: More Competition is Possible, Nomos Baden-Baden 1976.

Monopolies Commssion: 2nd Regular Report: Continued Concentration on the Level of Large Enterprises Nomos Baden-Baden 1978.

Monopolies Commission: 3rd Regular Report: Merger Control Continues to be of Primary Importance, Nomos Baden-Baden 1980.

World Law of Competition Unit B - Western Europe, Volume B 5 Stockmann, Kurt and Strauch, Volkmar Federal Republic of Germany, New York, October 1984.

Mueller, Rudolf Heidenhain, Martin Schneider, Hannes German Antitrust Law. An introduction to the German anti-trust law with German text and synoptic English translation of the Act against Restraints of Competition, Frankfurt, 1980.

Guide to Legislation on Restrictive Business Practices, Vol. II Germany, Act against Restraints of Competition, Explanatory notes on the legislation, OECD Paris.

Monopolies Commission: 4th Regular Report: Progress in the Assessment of Economic Concentration, Nomos Baden-Baden 1982.

Monopolies Commission: 5th Regular Report: Economic Criteria for the Application of Cartel Law, Nomos Baden-Baden 1984.

B. COMMENTARY BY THE GOVERNMENT OF FINLAND ON THE ACT ON RESTRICTIVE BUSINESS PRACTICES (709/1988)

A. Description of the reasons for the introduction of the legislation

In Finland competition issues have been increasingly emphasized in accordance with the international development in the 1980s. The importance of competition policy has increased.

The Finnish competition legislation has recently been reformed. In June 1988 the Finnish Parliament passed the bills for the Act and Decree on Restrictive Business Practices, the Act and Decree on the Office of Free Competition, the Act and Decree on the Competition Council and the Act on Price Freeze. The Acts came into force on 1 October 1988. The former competition law, which had been changed several times, dated from 1973.

When proposing the new legislation, the Government considered that market forces do not always ensure effective competition. Harmful restraints of competition may emerge, calling for government action. Restraints may be the outcome of agreements among market participants or of unilateral restrictive action by a market participant, or of legislation and other public policy measures.

The objective of the reform of the competition law is to remove restraints of competition deemed harmful, without resorting to unduly strict controls or sanctions. It is also essential to create conditions conducive to competition. In the application of the law, consumers' interest is of particular significance.

B. Description of the objectives of the legislation and the extent to which they have evolved since the introduction of the original legislation

The Act on Restrictive Business Practices aims at safeguarding sound and workable economic competition by counteracting harmful restrictive practices.

The Act on Restrictive Business Practices puts more stress on preventing the abuse of a dominant market position, on eliminating entry barriers and on accelerating the self-destructive tendencies of harmful restraints on competition. A firm that is able to affect the price level or conditions of delivery of a commodity is considered dominant. Refusal to deal, confinement of customers' discretion, unreasonable or predatory pricing and the utilization of the market position in other markets are regarded as abuses.

C. Description of the practices, acts or behaviour subject to control, indicating for each:

(a) The type of control:

Outright prohibition

The Act on Restrictive Business Practices prohibits collusive bidding and resale price maintenance.

Prohibition in principle

The Competition Council can on application determine that the provisions on prohibited restraints on competition are not applied to a certain restrictive practice. The exception may be admitted if the restrictive practice e.g. saves costs and if it benefits consumers or customers.

Examination on a case-by-case basis

Evaluation of all the other restraints on competition is on a case-by-case basis.

(b) The extent to which the practices, acts or behaviour in section D, paragraphs 3 and 4, of the Set of Principles and Rules are covered by this control, as well as any additional practices, acts or behaviour that may be covered, including those covered by controls relating specifically to consumer protection, for example controls concerning misleading advertising

The Act on Restrictive Business Practices is based on the principles of abuse and publicity. Restrictive practices and their effects will be investigated by the Office of Free Competition. If the Office considers a restrictive practice harmful, it must take measures necessary to remove those harmful effects.

D. Description of the scope of application of the legislation, indicating:

(a) Whether it is applicable to all transactions in goods and services and, if not, which transactions are excluded

The Act will not apply to agreements or arrangements concerning the labour market or the production of primary products referred to in the laws on agricultural income, or to agreements based on other laws or regulations or on any decisions made by a government authority by the laws or regulations.

(b) Whether it applies to all practices, acts or behaviour having effects on the country, irrespective of where they are committed

Unless otherwise provided by the Council of State, the Act on Restrictive Business Practices is not applicable to any restrictive practices restraining economic competition outside the Finnish territory in so far as they do not affect Finnish customers. The Council of State may, however, provide that the Act shall also extend to a restrictive practice concerning one or more foreign countries if a treaty concluded with another state so requires or if it is in the interest of Finland's foreign trade to make such provision.

(c) Whether it is dependent upon the existence of an agreement, or of that agreement being put into effect

The application of the Act is not dependent upon the existence of an agreement. The factual existence of an arrangement justifies the application of the law.

E. Description of enforcement machinery, indicating any notification and registration agreements, and principal powers of body

The Office of Free Competition is responsible for issues related to competition. The Office is subordinate to the Ministry of Trade and Industry. The task of the Office is to maintain sound and workable economic competition. The Office of Free Competition analyses conditions and restraints of competition, takes action to nullify the harmful effects of restraints and takes initiatives to increase competition in various industries.

The Competition Council has the ultimate authority to decide on the harmful effects of the restraints on competition.

In the case of a restrictive practice that concerns mainly banking, deliberation of the issue by the Competition Council shall be proposed by the Bank Inspectorate. If a restrictive practice concerns insurance, the corresponding proposal shall be made by the Ministry of Social Affairs and Health.

F. Description of any parallel or supplementary legislation, including treaties or understandings with other countries, involving co-operation or procedures for resolving disputes in the area of restrictive business practices

Finland is a member of EFTA and it has a treaty with EEC concerning free trade of industrial products and a treaty with ECSC concerning free trade of coal and steel.

G. Description of the major decisions taken by administrative and/or judicial bodies and the specific issues covered

The main functions of the Office of Free Competition are investigation and negotiation.

The Office made 182 decisions from 1 October 1988 to 25 August 1989. Most of the decisions were registrations of regional dominant market positions. Several of the cases have been decisions to cancel horizontal cartel agreements. None of the treated cases has been taken to the Competition Council until now.

H. Short bibliography citing sources of legislation and principal decisions, as well as explanatory publications by Governments, or legislation, or particular parts thereof

Act and Decree on Restrictive Business Practices (709,710/88)
Act and Decree on the Office of Free Competition (711,712/88)
Act and Decree on the Competition Council (715,716/88)
The Government Proposal to the Parliament for the Competition legislation, 30 October 1987.

Annex I

FEDERAL REPUBLIC OF GERMANY :

ACT AGAINST RESTRAINTS OF COMPETITION OF 27 JULY 1957

1.0 ACT AGAINST RESTRAINTS OF COMPETITION OF 27 JULY 1957

AMENDING LEGISLATION	DATE	SECTIONS AFFECTED BY MAJOR AMENDMENTS
Ordinance on Advocates	1 Aug. 1959	97 (1)
Act on the Protection of Copyrights and Related Rights	9 Sep. 1965	102a
Act to Amend the Act on Restraints of Competition ...	15 Sep. 1965	5; 5a; 9 (2); 10 (1); 16 (4) (5) and (6); 17 (1) 18; 22 (3); 23; 24; 38 (3). 44; 53 (3); 59; 60; 61; 62 (1); 81; 82; 83; 84; 85; 86; 86a; 90 (4);
Administrative Offences Act	24 May 1968	38; 39; 40-43; 55; 81-85; 97.
Second Act to Amend the Act against Restraints of Competition	3 August 1973	36; 9; 10(1); 11(5); 12(1); 16-18; 22-24b; 25-26; 28(2); 37a; 38; 38a; 44(1); 50(1); 51(2); 53(3); 56-58; 62(4); 63(1); 63a; 65(1); 72 No. 2; 74(4); 75; 80; 87(1); 91 91(1); 99; 104a and 105.
Third Act to Amend the Act against Restraints of Competition	28 June 1976	22(3); 23(1); 24(2); 24(8) and 24(1)
Fourth Act to Amend the Act against Restraints of Competition	26th April 1980	12; 22(4); 23(1) and (2); 23a; 24(8) and (9); 24 a(1) and (4); 24b(5) ; 26 ; 35 ; 37a(3); 37b; 38(1), (4) and (5) ; 38a (1), (3) and (6); 44(1) ; 50; 56 ; 58 ; 63(1); 63 a(3) and (4) ; 70(3) ; 78 (2) ; 80(2) and (3); 82(1); 98(2); 100(3) and (8); 102 ; 103 - 103 a ; 106(2) and (3) ; 109.

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Part I
RESTRAINTS OF COMPETITION

Chapter 1
Cartel Agreements and Cartel Decisions

Section 1

(1) Agreements made for a common purpose by enterprises or associations of enterprises and decisions of associations of enterprises shall be of no effect, insofar as they are likely to influence, by restraining competition, production or market conditions with respect to trade in goods or commercial services. This shall apply only insofar as this Act does not provide otherwise.

(2) The term "decision of associations of enterprises" shall include decisions of meetings of the members of a legal entity, insofar as such members are enterprises.

Section 2

(1) Section 1 shall not apply to agreements and decisions which deal with the uniform application of general terms of business, delivery and payment including cash discounts. Such arrangements must not relate to prices or components of prices.

(2) When notification is effected under Section 9(2), it must be shown that the suppliers and purchasers affected by agreements or decisions of the nature described in subsection (1) have been duly heard. Their comments shall be attached to the notification.

(3) Agreements and decisions of the nature described in subsection (1) shall take effect only if the cartel authority does not object to them within a period of three months from receipt of the notification. An objection may only be based on the grounds set forth in Section 12(1).

Section 3

(1) Section 1 shall not apply to agreements and decisions concerning rebates on goods supplied, insofar as such rebates represent a genuine compensation for services rendered and do not lead to unjustified discriminatory treatment of stages in the economic process or of customers at the same stage who render the same service to suppliers when purchasing goods.

(2) When notification is effected under Section 9(2), it must be shown that the conditions of subsection (1) are met and that the representatives of the economic stages to which the rebate regulation is to apply have been heard. Their comments shall be attached to the notification.

(3) Agreements and decisions of the nature described in subsection (1) shall take effect only, if the cartel authority does not object to them within a period of three months from receipt of the notification. Objection shall be raised by the cartel authority, if

1. it has not been shown that the conditions of subsection (1) are met and that the representatives of the economic stages to which the rebate regulation is to apply have been heard, or
2. it is evident that the agreement or decision has harmful effects on the flow of production or trade, or on the adequate supply to consumers, in particular if the setting up of a business activity at any economic stage is impeded, or
3. participants in the market show within one month from the publication of the notification (Section 10(1)) that they are given unjustified discriminatory treatment under the agreement or decision.

(4) The cartel authority may declare agreements or decisions within the meaning of subsection (1) of no effect after the expiration of the period specified in subsection (3), sentence 1, if any of the reasons stated in subsection (1) or (3) exists.

Section 4

In the event of a decline in sales due to a lasting change in demand, the cartel authority may, upon application, authorise an agreement or a decision of the nature described in Section 1 with regard to enterprises engaged in the production, manufacture, or processing of goods, if such agreement or decision is necessary to bring about a planned adjustment of productive capacity to the demand and if the arrangement takes into consideration the overall economy and the public interest.

Section 5

(1) Section 1 shall not apply to agreements and decisions which deal exclusively with the uniform application of standards or types. The comments of a rationalisation association shall be attached to the notification under Section 9 (2). Rationalisation associations within the meaning of this Act shall be associations whose statutes include the duty to carry out or examine standardisation projects, with due participation of the suppliers and purchasers affected by such projects.

(2) The cartel authority shall, upon application, authorise an agreement or a decision of the nature described in Section 1, if the arrangement serves to rationalise economic activities and is likely to increase substantially the efficiency or productivity of the participating enterprises from a technical, economic or organisational point of view, and to improve thereby the satisfaction of demand. The rationalisation effect must be adequate in relation to the restraint of competition connected with it.

(3) If the agreement or decision is intended to bring about rationalisation in conjunction with price agreements or by the establishment of joint purchasing or selling organisations (Syndikate), authorisation may only be granted if the

rationalisation purpose cannot be achieved by other means and if the rationalisation is desirable in the public interest. The rationalisation effect must be adequate in relation to the restraint of competition connected with it.

(4) Agreements and decisions which establish uniform methods for specification of services or for price breakdowns in the economic sectors specified in the next sentence, shall not fall within Section 1 if they do not fix prices or components of prices. This shall apply to those economic sectors in which, upon an invitation to tender, bids in respect of goods or commercial services can be made only on the basis of descriptions which do not allow of a qualitative examination at the time the contract is concluded.

Section 5a

(1) Section 1 shall not apply to agreements and decisions whose object is the rationalisation of economic activities by specialisation, provided that substantial competition continues to exist in the market. Sentence 1 shall apply also if the agreement or decision is intended to bring about such specialisation in conjunction with agreements of the nature specified in Section 5 (2) or (3) and if the agreements are necessary to effect such specialisation.

(2) When notification is effected under Section 9 (2), it must be shown that the conditions set forth in subsection (1) are met.

(3) Agreements and decisions of the nature described in subsection (1) shall take effect only if the cartel authority does not object to them within a period of three months from receipt of the notification. Objection shall be raised by the cartel authority if it has not been shown that the conditions of subsection (1) are met. If amendments or additions to an agreement or a decision of the nature described in subsection (1) are notified which neither change the circle of enterprises involved, nor extend the specialisation to other goods and services, the period referred to in sentence 1 shall be one month.

Section 5b

(1) Section 1 shall not apply to agreements and decisions whose object is the rationalisation of economic activities by a type of co-operation between enterprises other than that specified in Section 5a, if competition on the market is not thereby substantially impaired and the agreement or decision serves to promote the efficiency of small or medium-sized enterprises.

(2) Section 5a (2) and (3) shall apply as appropriate.

Section 6

(1) Section 1 shall not apply to agreements and decisions which serve to protect and to promote exports, insofar as they are limited to regulation of competition in markets outside the area to which this Act applies.

(2) The cartel authority shall, upon application, authorise an agreement or a decision of the nature described in Section 1, if regulation within the scope of subsection (1) also covers trade in goods or commercial services within the area to which this Act applies, insofar as such regulation is necessary to ensure the desired regulation of competition in the markets outside such area. These provisions shall apply notwithstanding Section 15. The comments of the domestic producers and purchasers affected shall be attached to the application.

(3) No authorisation under subsection (2) shall be granted by the cartel authority, if the agreement or decision or the manner of its implementation :

1. violates the principles concerning trade in goods and commercial services accepted by the Federal Republic of Germany in international treaties, or

2. may lead to a substantial restraint of competition within the area to which this Act applies and if there is an overriding interest in preserving competition.

(4) The cartel authority may authorise the parties to effect a regulation of the type covered by subsection (2) within a specified framework.

Section 7

(1) The cartel authority may, upon application, authorise an agreement or a decision of the nature described in Section 1, insofar as it regulates only importation into the area of application of this Act and facing the German importers there is no competition or only insignificant competition among the suppliers.

(2) Section 6(2), sentence 3, and (3) shall apply as appropriate.

Section 8*

(1) If the conditions of Sections 2 to 7 are not satisfied, the Federal Minister for Economic Affairs may, upon application, authorise an agreement or a decision within the meaning of Section 1 if, exceptionally, the restraint of competition is necessary for overriding reasons connected with the economy as whole and the public interest.

(2) If there is immediate danger to the continued operation of a majority of the enterprises of an economic sector, authorisation pursuant to subsection (1) may be granted only if other legislative or economic measures cannot be taken or cannot be taken in time and if the restraint of competition is likely to avert such danger. Authorisation may be granted only in especially serious individual cases.

(3) Section 6 (2), sentence 3, shall apply as appropriate.

Section 9

(1) Agreements and decisions for which authorisation has been granted pursuant to Sections 4, 5 (2) and (3), 6 (2), 7, or 8 shall be entered in the Cartel Register.

(2) Agreements and decisions of the nature described in Sections 2, 3, 5 (1), 5a (1), 5b (1), and 6 (1) as well as amendments and additions thereto shall take effect only if they have been notified to the cartel authority. In the cases specified in Section 5 (1), sentence 1, the notification shall only be considered to have been effected if the comments of a rationalisation association, as required by Section 5 (1), sentence 2, are attached thereto. Agreements and decisions of the nature described in Section 5 (4) shall be notified to the cartel authority without delay. Agreements and decisions that have been notified, with the exception of those referred to in Section 6(1), shall be entered in the Cartel Register.

(3) The termination or cancellation of agreements and decisions specified in subsections (1) and (2) shall be notified to the cartel authority; it shall be entered in the Cartel Register.

* See also the provisions of the Energy Assurance Act (Guide 2.1).

(4) The Cartel Register shall be kept at the Federal Cartel Office. The particulars to be entered in the Cartel Register shall be as follows:

1. firm name or other designation and location of establishment or registered office of the participating enterprises;
2. names and addresses of the owners or partners of the participating enterprises; in the case of legal persons, names and addresses of the persons empowered by law to represent them;
3. legal form and address of the cartel;
4. name and address of the appointed representative (Section 36) or other agent of the cartel; in the case of legal persons, names and addresses of its legal representatives;
5. the main provisions of the agreements and decisions, especially particulars concerning the goods and services they cover, their purpose, the measures envisaged, their duration, their termination, and withdrawal from them;
6. amendments and additions to Nos. 1 to 5;
7. termination of the agreements and decisions;
8. any time limits, restrictions and conditions imposed by the cartel authority, as well as any revocation of authorisation, and any invalidation of agreements and decisions by the cartel authority.

(5) Notifications to the cartel authority shall be made orally or in writing.

(6) The Cartel Register shall be open to public inspection.

(7) Detailed provisions regarding the establishment and keeping of the Cartel Register shall be issued by the Federal Minister for Economic Affairs by ordinance (Rechtsverordnung) not requiring the consent of the Bundesrat.

Section 10

(1) Notice of the following shall be published in the Federal Gazette (Bundesanzeiger):

1. applications for authorisation for agreements and decisions of the nature specified in Sections 4, 5 (2) and (3), 6 (2), 7, and 8;
2. notifications of agreements and decisions of the nature described in Sections 2, 3, 5 (1) and (4), 5a (1) and Section 5b (1);
3. notifications of recommendations of the nature described in Section 38 (2) Nos. 2 and 3;
4. the particulars entered in the Cartel Register pursuant to Section 9 (4) Nos. 3, 5, 6, 7, and 8;
5. mergers notified under Section 23 as well as an application for authorisation of a merger under Section 24 (3).

Section 9 (4) Nos. 3, 5, and 6 shall apply as appropriate regarding the contents of the publication pursuant to Nos. 1 and 2 above. Section 9 (4) No. 5 shall apply as appropriate regarding the contents of the publication pursuant to No. 3; in addition, the publication shall state by whom the recommendations were notified and to whom they are addressed. Section 23 (4), sentence 1 and sentence 2, Nos. 1 and 2 shall apply as appropriate regarding the contents of the publication pursuant to No. 5.

(2) Insofar as the applications or notifications referred to in subsection (1) are entered in the Cartel Register, reference to the publication of the applications or notifications shall be deemed sufficient notice of such entry.

Section 11

(1) An authorisation pursuant to Sections 4, 5 (2) and (3), 6 (2), 7, or 8 shall, normally, not be granted for more than a period of three years.

(2) Upon application, the authorisation may be extended subject to subsection (1). The extension shall only be granted with regard to those participating enterprises which have informed the cartel authority in writing of their consent to the extension; such consent must be given by the individual enterprises themselves and may not be submitted earlier than three months prior to the expiration of the authorisation.

(3) The authorisation may contain restrictions or conditions.

(4) The authorisation may be revoked, or may be varied by imposing restrictions or conditions, if

1. the relevant circumstances have materially changed, or
2. the cartel or the participating enterprises contravene any condition attached to the authorisation.

(5) The authorisation shall be revoked, or be varied by imposing restrictions or conditions, if

1. it had been obtained by the applicant or any other person by unlawful means, such as fraud or threats, or
2. the cartel or the participating enterprises abuse the exemption from Section 1 obtained by means of the authorisation, or
3. the agreement or decision or the manner of its implementation violates the principles concerning trade in goods and commercial services accepted by the Federal Republic of Germany in international treaties, or
4. the cartel contravenes the prohibition laid down in Sections 25 (2) or (3), or 26.

Section 12

(1) With regard to agreements and decisions of the nature described in Sections 2, 3, 5 (1) and (4), 5a (1) and 5b (1), the cartel authority may take the measures described in sub-section (3).

1. insofar as the agreements and decisions or the manner of their implementation constitute an abuse of the market position obtained as a result of the exemption from Section 1, or
2. insofar as they violate the principles concerning trade in goods and commercial services accepted by the Federal Republic of Germany in international treaties.

(2) With regard to agreements and decisions of the nature described in Section 6 (1), the cartel authority may take the measures described in subsection (3), insofar as

1. the condition mentioned in subsection (1) No. 2 is present, or

2. the implementation of the agreements or decisions substantially impairs predominating foreign trade and payments interests of the Federal Republic of Germany.

(3) The cartel authority may

1. direct the participating enterprises to discontinue the abuse objected to,
2. direct the participating enterprises to amend the agreements or decisions, or
3. declare the agreements and decisions to be of no effect.

Section 13

(1) Any party thereto may terminate agreements and decisions of the nature described in Sections 2 to 8 by written notice, with immediate effect, if a substantial reason justifies such action. A substantial reason exists, in particular, if the freedom of economic action of the terminating party is unfairly restricted or impaired in relation to the other parties by unjustified differential treatment. Ineffectiveness of the termination for lack of a substantial reason may be asserted only by bringing an action within 4 weeks from receipt of the notice of termination.

(2) So long as the cartel authority has not authorised agreements and decisions of the nature described in Sections 4, 5 (2) and (3), 6 (2), 7, or 8, any party may withdraw from them if a substantial reason justifies such action. Subsection (1), sentences 2 and 3, shall apply as appropriate. If application for authorisation was filed with the cartel authority prior to such withdrawal, the cartel authority shall also be informed of the withdrawal.

(3) Any agreement which purports to bar the right of termination or of withdrawal or in violation of these provisions to restrict such rights by legal or economic means shall be null and void.

Section 14

(1) Security provided under agreements or decisions referred to in Sections 2 to 8 may be realised only insofar as the cartel authority, upon application by the cartel, has granted authorisation. Authorisation shall be refused if such realisation unfairly restricts the freedom of economic action of the party concerned or adversely affects such party by unjustified unequal treatment in relation to the other parties.

(2) The authorisation may set time-limits and contain restrictions and conditions.

Chapter 2

Other Agreements

Section 15

Agreements between enterprises with respect to goods or commercial services relating to markets located within the area of application of this Act shall be null and void, insofar as they restrict a party to them in its freedom to determine prices

or terms of business in contracts which it concludes with third parties in regard to the goods supplied, other goods, or commercial services.

Section 16

Section 15 shall not apply, insofar as a publishing enterprise binds the purchasers of its publications by legal or economic means to observe certain resale prices or to impose the same obligation upon their own customers down to the resale to the ultimate consumer.

Section 17

(1) The cartel authority may, on its own motion, and shall, upon application filed by a purchaser bound under Section 16, declare the resale price maintenance to be of no effect either immediately or as from some future date to be determined by it and forbid the operation of a new, similar price maintenance system, if it finds that

1. the resale price maintenance system is operated abusively, or
2. the resale price maintenance system or a combination of resale price maintenance and other restraints of competition is likely, in a manner not justified by the overall economic situation, to increase the prices of the goods concerned, prevent their prices from decreasing or restrict the production or sale of such goods.

(2) Before taking action under subsection (1), the cartel authority shall call upon the price-maintaining enterprises to discontinue the abuse.

Section 18

(1) The cartel authority may declare agreements between enterprises in respect of goods or commercial services to be of no effect either immediately or as from some future date to be determined by it, and forbid the implementation of new, similar agreements, insofar as the latter impose on one of the parties :

1. restrictions as to its freedom to use the supplied goods, other goods or commercial services, or
2. restrictions as to the purchase of other goods or commercial services from, or their sale to, third parties, or
3. restrictions as to the sale of the supplied goods to third parties, or
4. an obligation to accept goods or commercial services not related to the subject-matter of the agreements by their nature or the custom of the trade,

and insofar as

a) by such agreements a significant number of enterprises in relation to competition in the market are similarly bound and unfairly restricted in their freedom of competition, or

b) by such agreements market entry by other enterprises is unfairly restricted, or

c) by the extent of such restrictions competition in the market for these or other goods or commercial services is substantially impaired.

(2) The term "unfairly" in subsection (1) letter b) shall not be construed so as to include a restriction which is insignificant in relation to the sources of supply and demand that are left open to other enterprises.

Section 19

(1) If the cartel authority declares a resale price maintenance system or a restriction of the nature described in Section 18 to be of no effect, the validity of the other provisions of the agreement connected therewith shall be determined by general rules of law except as otherwise provided in subsection (2).

(2) When issuing a decision of the nature described in subsection (1), the cartel authority may, at the request of a party to the agreement, simultaneously order that the declaration of non-effectiveness shall not affect the validity of the other provisions of the agreement. Such order may only be issued insofar as it is necessary to prevent undue hardship to a party to the agreement and if it is not against predominating interests of another party to the agreement.

(3) If there are any provisions which, in the event of subsection (1) applying, grant a right of withdrawal or termination to the beneficiary of the resale price maintenance system or restriction, or modify the contents of the agreements to the disadvantage of the other party, especially by increasing his obligations, no rights may be asserted under these provisions unless the cartel authority has, upon application, granted an authorisation. Such authorisation shall be granted if the exercise of these rights does not unfairly restrict the freedom of economic action of the other party. The authorisation may contain restrictions, time-limits and conditions.

Section 20

(1) Agreements concerning the acquisition or use of patents, utility models, or protected seed varieties shall be ineffective insofar as they impose upon the acquirer or licensee any restrictions on his business conduct which go beyond the scope of the protected right; restrictions pertaining to the type, extent, quantity, territory or period of exercise of such right shall not be deemed to go beyond its scope.

(2) Subsection (1) shall not apply to

1. restrictions imposed upon the acquirer or licensee insofar and so long as they are justified by the seller's or licensor's interest in a technically satisfactory exploitation of the protected matter,
2. obligations of the acquirer or licensee with respect to the price to be charged for the protected article,
3. obligations of the acquirer or licensee to exchange experience or to grant licenses for improvements in, or applied uses of, an invention, insofar as these obligations are in accordance with identical obligations of the patentee or licensor,
4. obligations of the acquirer or licensee not to challenge the protected right,
5. obligations of the acquirer or licensee relating to the regulation of competition in markets outside the area of application of this Act, insofar as such restrictions do not remain in force beyond the expiration of the acquired or licensed right.

(3) Upon application, the cartel authority may authorise an agreement of the nature described in subsection (1), if the freedom of economic action of the acquirer or licensee or other enterprises is not unfarily restricted, and if competition in the market is not substantially impaired by the extent of the restrictions involved. Section 11 (3) to (5) shall apply as appropriate.

(4) Sections 1 to 14 shall remain unaffected by the foregoing provisions.

Section 21

(1) Section 20 shall apply as appropriate to agreements concerning the assignment or the exploitation of legally unprotected inventions, manufacturing processes, technical designs, and other technological achievements, as well as legally unprotected advances in cultivation methods in the field of plant breeding, insofar as they constitute trade secrets.

(2) Section 20 shall apply as appropriate to agreements concerning seed of a variety appearing in the special varieties list (Sec. 44 and 68 of the Seed Trade Act of 20 May 1968, Legal Gazette I, p. 444 - as amended by the Act to Amend the Seed Trade Act of 22 May 1975, Legal Gazette, p. 1157) or in the varieties register (Sec. 74 b and 74 d of the aforecited Act) between a plant breeder and a seed multiplier or a seed multiplying enterprise.

Chapter 3

Market Dominating Enterprises

Section 22

(1) An enterprise is market dominating within the meaning of this Act insofar as, in its capacity as a supplier or buyer of a certain type of goods or commercial services,

1. it has no competitor or is not exposed to any substantial competition, or
2. it has a paramount market position in relation to its competitors; for this purpose, in addition to its share of the market, its financial strength, its access to the supply or sales markets for goods and services, its links with other enterprises and the legal or actual barriers to the market entry of other enterprises shall in particular be taken into account.

(2) Two or more enterprises shall also be deemed market dominating insofar as, in regard to a certain type of goods or commercial services, no substantial competition exists between them, for factual reasons, either in general, or in specific markets, and they jointly meet the requirements of subsection (1).

(3) It shall be presumed that

1. an enterprise is market dominating within the meaning of subsection (1), if it has a market share of at least one-third for a certain type of goods or commercial services; this presumption shall not apply when the enterprise recorded a turnover of less than DM 250 million in the last completed business year;
2. the conditions specified in subsection (2) are met if, in regard to a certain type of goods or commercial services,

a) three or less enterprises have a combined market share of 50% or over, or

b) five or less enterprises have a combined market share of two-thirds or over

this presumption shall not apply, insofar as enterprises are concerned which recorded turnovers of less than DM 100 million in the last completed business year.

As regards the calculation of the market share and turnover, Section 23 (1), sentences 2 to 10 shall apply, as appropriate.

(4) In regard to market dominating enterprises, the cartel authority shall have the powers set out in subsection (5), insofar as these enterprises abuse their dominating position in the market for these or any other goods or commercial services.

An abuse within the meaning of sentence 1 is present, in particular, if a market-dominating enterprise as a supplier or buyer of a certain type of goods or commercial services

1. impairs the competitive possibilities of other enterprises in a manner relevant to competition on the market in the absence of facts justifying such behaviour ;

2. demands considerations or other business terms which deviate from those which would result in all probability if effective competition existed ; in this context in particular the practices of enterprises on comparable markets characterised by effective competition have to be taken into account;

3. demands less favourable considerations or other business terms than are demanded from similar buyers on comparable markets by the market dominating enterprise, unless there is a factual justification for such differentiation.

(5) If the conditions laid down in subsection (4) are satisfied the cartel authority may prohibit abusive practices by market dominating enterprises and declare agreements to be of no effect; Section 19 shall apply as appropriate. Prior to such action, the cartel authority shall request the parties involved to discontinue the abuse to which objection was raised.

(6) Insofar as the conditions laid down in subsection (1) are satisfied in regard to an affiliated company (Konzernunternehmen) within the meaning of Section 18 of the Joint Stock Companies Act,* the cartel authority may use its powers under subsection (5) in relation to each affiliated company.

Section 23

(1) The merging of enterprises shall immediately be notified to the Federal Cartel Office, if

* Section 18 of the Joint Stock Companies Act (Aktiengesetz of 6 september 1965, BGBl 1965 I, p. 1089) states that a group (Konzern) is formed if a dominant enterprise and one or more dependent enterprises are united under the control of the dominant enterprise; the affiliated enterprises are known as Konzern enterprises (Konzernunternehment). Enterprises which have entered into a control agreement (Section 291) or one of which has been merged with the other (Section 319) are deemed to be united under common control. A dependent enterprise is presumed to form a Konzern with the controlling enterprise. A Konzern is also formed if legally separate enterprises neither of which is a subsidiary of the other, are united under common control.

1. within the total area of application of this Act or in a substantial part thereof a market share of at least 20 % is obtained or increased by the merger or if a participating enterprise has a share of at least 20% in another market, or

2. the participating enterprises together at some date during the completed business year preceding the merger had at least 10,000 employees or recorded a turnover of at least DM 500 million in this period.

If one of the participating enterprises is a controlled or controlling enterprise within the meaning of section 17 of the Joint Stock Companies Act or an affiliated company (Konzernunternehmen) within the meaning of Section 18 of that Act, the enterprises linked in this manner shall be regarded as a single enterprise for the calculation of market shares, number of employees and turnovers; if several enterprises as a result of an agreement or otherwise act together in such a way that they jointly are able to exercise a controlling influence on a participating enterprise, each of them shall be regarded as a controlling enterprise. Section 158 (1) and (2) of the Joint Stock Companies Act shall apply as regards the calculation of the turnover; revenues from supply of goods and services between enterprises which are linked within the meaning of sentence 2 (intra-group revenues), value added tax as well as consumption taxes shall be left out of account; turnovers in a foreign currency shall be converted into Deutsche Mark at the official exchange rate. In the case of credit institutions and building and loan associations, there shall be substituted for turnover one tenth of the total assets, and as regards insurance companies, the premium income of the last completed business year. Amounts recorded as investments in affiliated enterprises as defined in sentence 2 shall be deducted from the balance sheet total ; premium income shall mean income from insurance and reinsurance business including amounts ceded to reinsurers. As regards enterprises whose operations wholly or partially consist of trade in goods, only three-fourths of the turnover shall be taken into account. As regards enterprises whose operations wholly or partially consist of publishing, producing or distributing newspapers or magazines or parts of them, twenty times the amount of the turnover shall be taken into account ; sentence 6 remains unaffected. * Where all or a substantial part of the assets of another enterprise are acquired, the calculation of the market share, number of employees and turnover of the selling enterprise shall take account of the sold assets only. Sentence 8 shall apply, as appropriate, to the acquisition of shares, insofar as less than 25 per cent of the shares are retained by the seller and the merger does not satisfy the conditions set out in subsection (2) No. 2 sentence 3 and No. 5. If a person or an association of persons not being an enterprise is entitled to the majority interest in an enterprise, he, she or it shall be deemed to be an enterprise for the purposes of this Act.

(2) The following transactions shall be deemed mergers within the meaning of this Act:

1. acquisition of all or of a substantial part of the assets of another enterprise by amalgamation, reconstruction or in any other way;

2. acquisition of shares in another enterprise, provided the shares alone or together with other shares already held by the acquiring enterprise

   a) amount to 25 % of the voting capital of the other enterprise, or

   b) amount to 50 % of the voting capital of the other enterprise, or

   c) secure the enterprise a majority interest within the meaning of Section 16(1) of the Joint Stock Companies Act.

* Sentence added by Section 1 of the Third Act to Amend the Act against Restraints of Competition of 28th June 1976.

The shares held by the acquiring enterprise shall include also the shares belonging to a linked enterprise within the meaning of subsection (1), sentence 2, or held by another enterprise for the account of one of these enterprises, and, if the owner of the enterprise is a sole proprietor, any other shares belonging to the owner. If several enterprises simultaneously or successively acquire shares in another enterprise to the extent above mentioned, this shall also be deemed a merger of the participating enterprises (joint venture) (Gemeinschaftsunternehmen) as regards the markets in which the other enterprise operates. The acquisition of shares shall also be deemed a merger, insofar as the acquirer obtains, by means of an agreement, by laws, articles of association, or a resolution, the legal position held in a joint stock company by a shareholder owning more than 25 per cent of the voting capital. Shares in an enterprise shall be equal to voting rights.

3. Agreements with another enterprise by which:

   a) a Konzern within the meaning of Section 18 of the Joint Stock Companies Act is formed or the group of affiliated companies (Konzernunternehmen) is enlarged, or

   b) the other enterprise undertakes to carry on its operations for the account of the enterprise or to transfer its profit wholly or partially to the enterprise, or

   c) the plant of the other enterprise or a substantial part thereof is leased or otherwise transferred to the entreprise.

4. Bringing into existence a situation where at least half the members of the supervisory boards, the boards of management, or any other managing bodies of enterprises consist of the same persons.

5. Any other combination of enterprises as a result of which one or several enterprises are able directly or indirectly to exercise a controlling influence on another enterprise.

(3) A merger shall also be presumed to occur if the participating enterprises are already combined as defined in subsection (2), except when such merger does not result in a substantial strengthening of the existing relationship. If a credit institution acquires shares in another enterprise, on its formation or when its capital is increased, or otherwise within the context of its business operations, for the purpose of selling them on the market, this shall not be deemed a merger so long as the credit institution does not exercise the voting rights attaching to the shares and provided the sale is effected within one year; when an enterprise is established, exercise of voting rights at the first general meeting following the establishment shall not constitute a merger. If an enterprise participating in a merger is an affiliated company within the meaning of subsection (1), sentence 2, then the controlling enterprise as well as the enterprises by which the controlling enterprise is itself controlled shall be considered participants in the merger. If two or more enterprises merge, this shall also be deemed a merger of the enterprises controlled by them.

(4) Notification shall be required:

1. in the case of amalgamation or reconstruction, by the owners of the acquiring or newly formed enterprise or their representatives, or, in the case of legal persons and partnerships, by the persons designated as their representatives by law or by the articles of association;

2. in other cases

   a) by the owners of enterprises participating in the merger, and

b) where subsection (2), Nos. 1 and 2, applies, also by the sellers or their representatives, or, in the case of legal persons and partnerships, by the persons designated as their representatives by law or by the articles of association; where letter b) applies, subsection (3), sentence 3, shall apply as appropriate.

(5) The notification shall indicate the form taken by the merger. Furthermore it shall include the following data regarding each participating enterprise.

1. firm name or other designation and location of establishment or registered office;
2. type of business;
3. insofar as the conditions of subsection (1), sentence 1, are satisfied, the market share including the basis of its calculation or estimate, the number of employees and the turnovers; as regards credit institutions and building and loan associations, the total assets shall be stated instead of the turnover and, as regards insurance companies, the premium income;
4. when shares in another enterprise are acquired (subsection (2) No. 2), the amount of the shareholding acquired and of the total shareholding owned in it.

If a participating enterprise is an affiliated company within the meaning of subsection (1), sentence 2, the particulars required in sentence 2, Nos. 1 to 3 shall also be given for such affiliated companies, and the Konzern relationships, degrees of dependency and percentages of holdings of the affiliated companies shall be included in such particulars.

(6) The Federal Cartel Office may request each of the participating enterprises to supply information on market shares including the basis for their calculation or estimate as well as the turnover for a specific type of goods or commercial services which the enterprise recorded in the last business year ending before the merger. If a participating enterprise is an affiliated company within the meaning of subsection (1), sentence 2, the Federal Cartel Office may also request such information regarding the affiliated companies; it may also request the information from the affiliated companies. Section 46 (2), (5) and (9) shall apply, as appropriate. The Federal Cartel Office shall set a reasonable time-limit for the furnishing of the information. The powers of the Federal Cartel Office under Section 46 shall remain unaffected.

Section 23a

(1) Notwithstanding Section 22 (1) to (3), for merger control purposes a paramount market position shall be presumed to be created or strengthened as a result of a merger, if

1. an enterprise which recorded a turnover of at least DM 2,000 million in the last completed business year preceding the merger merges with another enterprise which
   (a) operates in a market in which small and medium-sized enterprises have a combined market share of at least two-thirds and the enterprises participating in the merger have a combined market share of at least 5 per cent, or

b) is market-dominating in one or several markets which in the last completed calendar year had a total turnover of at least DM 150 million, or

2. the enterprises participating in the merger recorded a combined turnover of at least DM 12,000 million in the last completed business year preceding the merger and at least two of the participating enterprises recorded individual turnovers of at least DM 1,000 million; this presumption shall not apply, insofar as the merger also satisfies the conditions of Section 23 (2) No. 2 sentence 3 and the joint venture does not operate in a market with a turnover of at least DM 750 million in the last calendar year.

(2) For merger control purposes a totality of enterprises shall also be deemed market-dominating, if

1. it consists of three or less enterprises which in one market hold the highest market shares and a combined market share of 50 per cent, or

2. it consists of five or less enterprises which in one market hold the highest market shares and a combined market share of two-thirds.

unless the enterprises prove that the conditions of competition may be expected to leave substantial competition between them also following the merger or the totality of enterprises have no paramount market position in relation to the other competitors. Sentence 1 shall not apply if enterprises are involved which recorded turnovers of less than DM 150 million in the last completed business year or if the enterprises participating in the merger hold a combined market share not exceeding 15 per cent. Section 22 (2) and (3) sentence 1 No. 2 shall remain unaffected.

(3) Section 23 (1) sentences 2 to 6 and 8 to 10 shall be applied regarding the calculation of the turnovers and market shares.

Section 24

(1) If it is likely that a market dominating position will be created or strengthened as a result of a merger, the cartel authority shall have the powers specified in the following provisions, unless the participating enterprises prove that the merger will also lead to improvements in the conditions of competition and that these improvements will outweigh the disadvantages of market domination.

(2) If the conditions of subsection (1) are present, the Federal Cartel Office shall prohibit the merger. The Federal Cartel Office may prohibit a merger as soon as the merger project has come to its knowledge; completed mergers may be prohibited by the Federal Cartel Office only within a one-year period from the receipt of the full notification under Section 23; Section 24a(2), Nos. 1 and 5 to 6 shall apply as appropriate.* Prior to prohibition the supreme Land authorities in whose territory the participating enterprises are located shall be given an opportunity to present their views. If the Federal Cartel Office has taken the decision mentioned in sentence 1, it shall be unlawful to complete the merger without the authorisation of the Federal Minister for Economic Affairs, or to participate in the completion of the merger; legal transactions in violation of this prohibition shall be of no effect; this shall not apply to agreements covering the amalgamation, reconstruction, integration or establishment of an enterprise and to agreements among enterprises

* Sentence amended by Section 1 of the Third Act to Amend the Act against Restraints of Competition of 28 June 1976.

within the meaning of Sections 291 and 292 of the Joint Stock Companies Act, once they have become enforceable by entry in the Commercial Register of the Co-operative Societies Register. A completed merger which has been prohibited by the Federal Cartel Office shall be dissolved, unless the Federal Minister for Economic Affairs authorises its continuation.

(3) Upon application, the Federal Minister for Economic Affairs shall authorise the merger if, in the case involved, the restraint of competition is outweighed by advantages to the whole economy resulting from the merger or if the merger is justified by a predominating public interest; in this respect the competitiveness of the participating enterprises in markets outside the area of application of this Act shall also be taken into account. The authorisation may only be given if the extent of the restraint of competition does not endanger the market economy system. The authorisation may contain restrictions and conditions. However, these must not aim at subjecting the actions of the participating enterprises to a continued control. Section 22 shall remain unaffected.

(4) The application for an authorisation for the merger shall be filed with the Federal Minister for Economic Affairs in writing within a one-month period. The period shall commence with the service of the decision taken by the Federal Cartel Office as described in subsection (2), sentence 1 ; if the decision is contested within the period of time provided in Section 65 (1), sentences 1 and 2, the period for the application for authorisation shall run from the date when the decision taken by the Federal Cartel Office becomes final. The Federal Minister for Economic Affairs shall decide on the application within four months from the expiry of the period specified in sentences 1 and 2 for the application for authorisation. Prior to the decision, the supreme Land authorities in whose territory the participating enterprises are located shall be given an opportunity to present their views.

(5) The Federal Minister for Economic Affairs may revoke the authorisation, or amend it by ordering restrictions, or include conditions, if the participating enterprises violate a condition attached to the authorisation. The Federal Minister for Economic Affairs may withdraw the authorisation, if the participating enterprises have obtained it by fraud, threats, bribery or by supplying information which was false or incomplete to a material extent.

(6) The dissolution of a completed merger may also consist in the restraint of competition being eleminated by means other than a return to the former situation. The Federal Cartel Office shall order the measures necessary to dissolve the merger, if

1. its decision defined in subsection (2), sentence 1, has become final; and
2. the participating enterprises had filed an application for authorisation for the merger with the Federal Minister for Economic Affairs and the rejection of this application or, where subsection (5) applies, the revocation or withdrawal has become final.

In so doing, and while safeguarding the interests of third parties, it shall order such measures as will attain the desired goal with a minimum of expense and burden for those involved.

(7) To enforce its order the Federal Cartel Office may in particular:

1. by imposing a non-recurring or recurring penalty payment of DM 10,000 to DM 1,000,000 cause those under a duty to dissolve the merger to take the measures ordered immediately;

2. prohibit the exercise of voting rights attaching to shares in one of the participating enterprises held by another participating enterprise or attributed to it, or make the exercise of the voting rights or the manner in which they are exercised conditional upon the authorisation of the Federal Cartel Office;

3. declare agreements bringing about the merger of the nature specified in Section 23 (2) Nos. 1 and 3 to be of no effect; this shall not apply to agreements covering the amalgamation, reconstruction, integration or establishment of an enterprise and to agreements among enterprises within the meaning of Sections 291 and 292 of the Joint Stock Companies Act, once they have become enforceable by entry in the Commercial Register or in the Co-operative Societies Register ;

4. appoint a trustee who shall execute the necessary legal documents on behalf of the enterprises obliged to dissolve the merger and take all necessary measures; in this respect it shall have to be determined to what extent the rights of those involved will be suspended so long as the trusteeship is in effect; as regards the legal relationship between the trustee and the enterprise involved, Sections 664, 666 to 670 of the Civil Code shall apply as appropriate; the trustee may demand reasonable compensation from the enterprise involved.

(8) Subsections (1) to (7) shall not apply

1. if the participating enterprises recorded a combined turnover of less than DM 500 million in the last completed business year, or

2. if an enterprise which is not a controlled enterprise and in the last completed business year recorded a turnover of less than DM 50 million affiliates itself to another enterprise; except when one enterprise recorded a turnover of at least DM 4 million and the other a turnover of at least DM 1,000 million, or

3. insofar as a market is affected in which goods or commercial services have been supplied for at least five years and which in the last calendar year had a turnover of less than DM, 10 million.

Section 23 (1) sentences 2 to 10 shall be applied regarding the calculation of the turnovers.

(9) Subsection (8) sentence 1 No. 2 shall not apply insofar as competition in the publication, production or distribution of newspapers or periodicals or parts of them is restricted within the meaning of subsection (1) as a result of the merger.

Section 24a

(1) A merger project may be notified to the Federal Cartel Office. The project shall be notified to the Federal Cartel Office, if

1. one of the enterprises participating in the merger recorded a turnover of at least DM 2,000 million in the last completed business year, or

2. at least two of the enterprises participating in the merger recorded individual turnovers of DM 1,000 million or over in the last completed business year, or

3. the merger is to be effected under the law of a Land by legislation or any other governmental act.

As regards the notification, Section 23 shall apply as appropriate, save that when Section 23 (1), sentence 1, No. 2 and subsection (6) is applied, for the date of the merger there shall be substituted the date of the notification, and that in the case of an amalgamation or reconstruction the owners, representatives, or persons appointed as representatives of the parties to the merger shall be obliged to file notification. The notification shall only be considered effective when the particulars specified in Section 23(5) are included. Section 46 (9) shall apply, as appropriate, to the information and documents obtained in connection with the notification.

(2) If the merger project has been notified to it, the Federal Cartel Office may prohibit the merger only if it informs the person who has effected the notification within a period of one month from receipt of the notification that it has begun an examination of the merger project and if the decision under Section 24 (2), sentence 1, is taken within a period of four months from receipt of the notification. The Federal Cartel Office may also prohibit the merger after the expiry of the four-month period, if

1. the enterprises participating in the merger have agreed to an extension of time, or
2. the merger is completed, although the one-month period specified in sentence 1 or, if the Federal Cartel Office has sent the communication referred to in sentence 1, the specified four-month period has not yet expired, or
3. the merger is completed other than as notified, or
4. the merger has not yet been completed and the conditions which caused the Federal Cartel Office to refrain from sending the communication referred to in sentence 1 or from prohibiting the merger under Section 24 (2), sentence 1, have materially changed, or
5. the Federal Cartel Office has sent the communication referred to in sentence 1 or not prohibited the merger under Section 24 (2), sentence 1, by reason of false or incomplete particulars having been supplied by the enterprises participating in the merger or by any other person, or
6. information under Section 23 (6) or Section 46 was not supplied or not supplied in due time and this has caused the Federal Cartel Office to act as described in No. 5.

(3) The notification of the merger project shall not affect the obligation to notify the merger under Section 23; when notification under Section 23 is filed, reference may be made to the material submitted for the notification of the merger project.

(4) If a merger project has to be notified under subsection (1) sentence 2, it shall be unlawful either to complete the merger prior to the expiry of the one-month period specified in subsection (2) sentence 1 and, if the Federal Cartel Office has given the information referred to in subsection (2) sentence 1 prior to the expiry of the specified four month period or the extension of time agreed upon, or to participate in the completion of the merger, except when the Federal Cartel Office, prior to the expiry of the periods mentioned in subsection (2) sentence 1 has given written information to the person who has effected the notification that the merger project does not meet the conditions of prohibition set out in Section 24 (1); legal transactions violating this prohibition shall be of no effect; this shall not apply to agreements covering the amalgamation, reconstruction, integration or establishment of an enterprise and to agreements among enterprises within the meaning of

Sections 291 and 292 of the Joint Stock Companies Act, once they have become enforceable by entry in the Commercial Register or in the Co-operative Societies Register.

Section 24b

(1) A Monopolies Commission shall be established to issue regular opinions on the trend of business concentration in the Federal Republic of Germany and the application of Sections 22 to 24a. It shall consist of five members who must have special knowledge and expertise in the fields of economics, business administration, social policy, technology or commercial law.

(2) The members of the Monopolies Commission must not be members either of the government or any legislative body of the Federal Republic or a Land or of the public service of the Federal Republic, a Land or any other public body, except as university teachers or staff members of a scientific institution. Furthermore, they must not be representatives of an economic association or of an employers' or employees' organisation, or be employed with one of them under a regular employment contract or special service contract. Nor must they have held such a position during the year preceding their appointment to the Monopolies Commission.

(3) In its opinion, the Monopolies Commission shall assess the current state of business concentration and its foreseeable trends from the standpoint of economic policy, and in particular competition policy, and shall evaluate the application of Sections 22 to 24a. It shall also indicate such amendments to the relevant provisions of this Act as it may deem necessary.

(4) The Monopolies Commission shall only be bound by the terms of this Act and shall carry on its activity independently. If a minority holds dissenting views when an opinion is drafted, it may express them in the opinion.

(5) The Monopolies Commission shall issue every two years, by June 30, an opinion covering the situation which prevailed during the last two completed calendar years and submit it immediately to the Federal Government, the first opinion being due on June 30, 1976. The opinions pursuant to sentence 1 shall immediately be submitted to the legislative bodies by the Federal Government and at the same time be published by the Monopolies Commission. Within a reasonable period the Federal Government shall present its views and comments on the opinions to the legislative bodies. The Monopolies Commission may give additional opinions as it deems appropriate. The Federal Government may instruct it to give additional opinions. The Monopolies Commission shall submit opinions pursuant to sentences 4 and 5 to the Federal Government and publish them. The Federal Minister for Economic Affairs has to request an opinion from the Monopolies Commission in particular cases which are submitted to him for decision under Section 24 (3).

(6) The Members of the Monopolies Commission shall be appointed by the President of the Federal Republic of Germany on a proposal by the Federal Government. One member shall retire from the Commission on July 1 of each year in which an opinion is to be issued under subsection (5), sentence 1. The sequence of retirement shall be determined by lot at the first meeting of the Monopolies Commission. On a proposal by the Federal Government, the President of the Federal Republic shall on each such occasion appoint one new member for a term of four years. Re-appointments shall be permissible. The Federal Government shall hear the

members of the Monopolies Commission before proposing new members. The members shall be entitled to resign their office by notice to the President of the Federal Republic. If a member retires prematurely, a new member shall be appointed for the term of office of the retiring member; sentences 4 to 6 shall apply as appropriate.

(7) Decisions of the Monopolies Commission shall require the agreement of at least three members. The Monopolies Commission shall elect its chairman from among its members. The Monopolies Commission shall establish its own rules of procedure.

(8) The Monopolies Commission shall have its own secretariat. The work of the secretariat shall comprise passing on and compiling source material, making technical preparations for meetings of the Monopolies Commission, printing and publishing the opinions as well as handling other administrative duties.

(9) The members of the Monopolies Commission and the staff of the secretariat shall be bound to secrecy as regards its discussions and discussion documents labelled as confidential by the Monopolies Commission. The secrecy requirement shall also cover information supplied to the Monopolies Commission and marked confidential. Section 46 (8) and (9) as well as Section 47 shall remain unaffected. *

(10) The members of the Monopolies Commission shall receive a lump-sum compensation and they shall be reimbursed their travelling expenses. These shall be determined by the Federal Minister for Economic Affairs in agreement with the Federal Minister of the Interior. The costs of the Monopolies Commission shall be borne by the Federal Republic.

Chapter 4

Restrictive and discriminatory conduct

Section 25

(1) Concerted action of enterprises or associations of enterprises which under this Act must not be made the subject-matter of a contractual commitment shall be forbidden.

(2) Enterprises or associations of enterprises shall not threaten or cause harm, or promise or grant advantages, to other enterprises for the purpose of inducing them to adopt conduct which, under this Act or a decision issued thereunder by the cartel authority, must not be made the subject-matter of a contractual commitment.

(3) Enterprises or associations of enterprises shall not coerce other enterprises:

1. to join an agreement or decision within the meaning of Sections 2 to 8, 29, 99 (2), 100 (1) and (7), 102, and 103, or
2. to merge with other enterprises within the meaning of Section 23, or
3. to act uniformly in the market with intent to restrain competition.

* Sentence 3 of Section 24b (9) of the Act Against Restraints of Competition has lost its validity in view of the repeal of Sections 46 (8) and 47 of the Act.

Section 26

(1) Enterprises or associations of enterprises shall not incite another enterprise or association of enterprises to refuse to sell or purchase with intent unfairly to harm certain enterprises.

(2) Market dominating enterprises, associations of enterprises within the meaning of Sections 2 to 8, 99 (2), 100 (1) and (7), 102 to 103, and enterprises fixing prices under Sections 16, 100 (3), or 103 (1), No. 3, shall not unfairly hinder, directly or indirectly, another enterprise in business activities which are usually open to similar enterprises, nor in the absence of facts justifying such differentiation treat such enterprise directly or indirectly in a manner different from the treatment accorded to similar enterprises. Sentence 1 shall also apply to enterprises and associations of enterprises, insofar as suppliers or purchasers of a certain type of goods or commercial services depend on them to such an extent that sufficient and reasonable possibilities of dealing with other enterprises do not exist. For the prohibition procedure pursuant to Section 37a (2) a supplier of a certain type of goods or commercial services shall be presumed to depend on a purchaser within the meaning of sentence 2, if, in addition to the price reductions or other considerations customary in the trade, that purchaser regularly obtains special benefits not granted to similar purchasers.

(3) Market-dominating enterprises and associations of enterprises within the meaning of subsection (2) sentence 1 shall not use their market position to cause other enterprises in business activities to accord them preferential terms in the absence of facts justifying such terms. Sentence 1 shall also apply to enterprises and associations of enterprises within the meaning of subsection (2) sentence 2, in relation to the enterprises depending on them.

Section 27

(1) If an enterprise is denied admission to a trade and industry association or a professional organisation, the cartel authority may, at the request of the enterprise concerned, order such admission if the denial constitutes factually unjustified unequal treatment and unfairly places the enterprise at a disadvantage in competition. Trade and industry associations within the meaning of this Act shall include quality-mark associations.

(2) The order may contain conditions.

(3) Section 11 (4), No. 1 and (5), No. 1 shall apply as appropriate.

Chapter 5
Competition Rules

Section 28

(1) Trade and industry associations and professional organisations may establish competition rules within their province.

(2) Competition rules within the meaning of this Act shall be provisions regulating the conduct of enterprises in competition for the purpose of counteracting conduct

which violates the principles of fair competition or the functioning of effective competition and of encouraging conduct in competition which is in line with these principles.

(3) Trade and industry associations and professional organisations may apply to the cartel authority for registration of competition rules in the register of competition rules. The cartel authority shall be notified of any changes in and additions to registered rules of competition.

Section 29

Agreements by which the participants bind themselves to adhere to registered competition rules within the meaning of Section 28 shall not be deemed agreements or decisions within the meaning of Section 1 of this Act.

Section 30

Non-participating enterprises at the same stage in the economic process, trade and industry associations and professional organisations of suppliers and purchasers affected by competition rules and the federal organisations for the economic stages involved shall be given an opportunity by the cartel authority to present their views. The cartel authority may hold a public oral hearing on the application for registration; at such hearing everybody may raise objections to the registration.

Section 31

(1) The cartel authority may reject the application for registration of a competition rule, if such rule or an agreement relating thereto within the meaning of Section 29 infringes the provisions of this Act, the Act Against Unfair Competition, the Discounts and Rebates Act, or the Decree for the Protection of the Economy of 9 March 1932, Title One (Premium Ordinance) (Legal Gazette of the Reich I, p. 121), taking into consideration the relevant court decisions, or any other provision of law.

(2) Trade and industry associations and professional organisations shall notify the cartel authority of the cancellation of any rules of competition established by them and entered in the register.

(3) The cartel authority shall direct the registration to be deleted if it subsequently finds that the conditions for rejection pursuant to subsection (1) are satisfied or if it is informed of the cancellation of the competition rules pursuant to subsection (2).

Section 32

(1) Notice of the following shall be published in the Federal Gazette:

1. applications under Section 28 (3);
2. the dates set for oral hearings pursuant to Section 30, sentence 2;
3. the registration of competition rules, and amendments and additions thereto;
4. the decision of competition rules pursuant to Section 31 (3).

(2) The publication of applications pursuant to subsection (1) No. 1 shall include a note to the effect that the competition rules whose registration has been applied for are open for public inspection at the cartel authority.

(3) Insofar as applications under subsection (1) No. 1 lead to entries in the register, reference to the publication of the applications shall be deemed sufficient notice of such entry.

Section 33

Any further provisions regarding the establishment and keeping of the register of competition rules shall be issued by the Federal Minister for Economic Affairs by ordinance requiring the consent of the Bundesrat.

Chapter 6
General Provisions

Section 34

Cartel agreements and cartel decisions (Sections 2 to 8), as well as agreements containing restrictions of the nature described in Sections 16, 18, 20 and 21, must be in writing. Section 126 (1) of the Civil Code shall apply. It shall be sufficient for the parties to sign documents which refer to a written decision, to written bylaws, or to a price list. Section 126 (2) of the Civil Code shall not apply.

Section 35

(1) Any person who wilfully or negligently contravenes any provisions of this Act or any decision issued under this Act by the Cartel authority or the appellate court shall, if such provision or decision is intended to protect another person, be liable to compensate such other person for any damage caused by such contravention. If a decision issued under Section 27 has been contravened, the injured party may also demand equitable compensation in money for any non-pecuniary damage.

(2) Any person who wilfully or negligently contravenes any decision issued by the cartel authority or the appellate court within the meaning of subsection (1) shall, if the decision or determination pursuant to Section 70 (3) becomes final, also compensate for any damage suffered from the date of service of the decision.

(3) In cases within subsection (1), an action for injunction may also be instituted by associations for the promotion of industrial interests, provided that the association has legal capacity to sue in civil cases.

Section 36

(1) The bylaws of any cartel, trade and industry association, or professional organisation which does not possess legal capacity shall designate a representative empowered to represent it before the cartel authority in all matters covered by this Act as well as in appeal proceedings (Sections 62 to 72) and in proceedings involving appeals on points of law (Sections 73 to 75). The name and address of the representative shall be notified to the cartel authority.

(2) Should there be no representative as defined by subsection (1), a representative shall be appointed, upon application by the cartel authority, by the local court (Amtsgericht) in whose district the cartel authority is located. The cartel authority shall file the application on its own initiative or at the request of any third party having a legitimate interest in the appointment of a representative. The local court shall revoke the appointment when the omission has been corrected.

Section 37

The members of a cartel which does not possess legal capacity shall be liable jointly and severally for any damage which an agent of the cartel causes a third party through any act committed in the performance of his duties, if such act gives rise to an obligation to pay compensation under this Act.

Chapter 7

Prohibition Procedure, Skimming-off Additional Receipts

Section 37a

(1) The cartel authority may prohibit the implementation of an agreement or a decision which is of no effect or null and void under Sections 1, 15, 20 (1), 21, 100 (1), sentence 3, or 103 (2).

(2) The cartel authority may prohibit enterprises and associations of enterprises from acting in a manner contrary to Sections 25, 26, and 38 (1), No. 11 or 12.

(3) The cartel authority may also prohibit an enterprise, which, as a result of its superior market power in relation to its small and medium-sized competitors, is able to influence market conditions substantially, from adopting conduct that unfairly hinders such competitors and is likely to impair competition permanently.

Section 37b

(1) Where an enterprise wilfully or negligently, as a result of conduct prohibited by a cartel authority decision pursuant to Section 22 (5) or Section 103 (6), has obtained additional receipts following service of the decision, the cartel authority may, after the decision or determination pursuant to Section 70(3) has become final, order the enterprise to pay over the amount corresponding to the additional receipts to the cartel authority (skimming-off additional receipts). Sentence 1 shall not apply insofar as the additional receipts are equal to the payment of damages made pursuant to Section 35 or to a fine. Additional receipts may be ordered to be skimmed off only within a period of three years from the date on which the decision or the determination pursuant to Section 70 (3) has become final.

(2) Where the skimming-off of additional receipts would result in undue hardship, the order shall be confined to a reasonable sum of money, or not be issued. It shall also not be issued where the additional receipts are insignificant.

(3) The amount of the additional receipts may be estimated. The sum of money to be paid over shall be expressed in figures.

(4) If an enterprise which has been ordered to pay over additional receipts submits to the cartel authority a final decision according to which it has to pay damages for the same abusive conduct, the cartel authority shall not enforce the order to pay over the additional receipts. If the additional receipts have already been paid over to the cartel authority and the enterprise proves that damages have been paid to the injured party on the basis of the final decision, the cartel authority shall return to the enterprise the additional receipts in the amount of the proven payment of damages.

Part II

OFFENCES

Section 38

(1) An offence is committed by any person who:

1. disregards the non-effectiveness or nullity of an agreement or decision which is of no effect or null and void under Sections 1, 15, 20 (1), 21, 100 (1), sentence 3, 103 (2) or 106;

2. wilfully or negligently disregards the non-effectiveness of an agreement or a decision, which the cartel authority under Sections 3 (4), 12 (3) No. 3, 17 (1), 18, 22 (5), 24 (7) No. 3, 102 (4) or (5), 102a (2), 103 (6) No. 3, 103a (3) or 104 (2) No. 3 has declared to be of no effect by a decision that has become final;

3. in contravention of Section 14 (1) realises a security without authorisation;

4. wilfully or negligently contravenes a final decision under subsection (3) of this section, Sections 12 (3) No. 1, 17 (1), 18, 22 (5), 24 (7) No. 2, 27, 37a, 38a (3) or (6), 102 (4) or (5), 102a (2), 103 (6) No. 1 or 104 (2) No. 1, insofar as it refers explicitly to this provision governing administrative fines.

5. wilfully or negligently contravenes a preliminary order issued under Section 56 or 63 (3), an order under Section 63a, or an enforceable decision under Section 38a (3) or (6), which refers explicitly to this provision governing administrative fines.

6. wilfully or negligently fails to comply with conditions imposed by the cartel authority, provided the decision imposing the condition has become final and refers explicitly to this provision governing administrative fines;

7. furnishes or uses false or incomplete information in order to obtain fraudulently an authorisation under this Act or the registration of a competition rule for himself or for another person or to induce the cartel authority not to raise objections in cases falling within the scope of Sections 2, 3, 5a (1) and (3), or 5b (2), not to issue a prohibition under Section 24 (2), sentence 1, or not to send the communication referred to in Section 24a (2), sentence 1;

8. contravenes any prohibition laid down in Section 24 (2), sentence 4, or Section 24a (4), participates in a violation of these prohibitions or contravenes any of the prohibitions laid down in Sections 25 or 26;

9. causes economic disadvantage to another person, because the latter has applied for or suggested that decisions be taken by the cartel authority or has exercised the rights granted him by Section 13;

10. by means of recommendations contributes to the commission of one of the offences described in Nos. 1 to 9;

11. issues recommendations which, through uniform conduct, result in the circulation of prohibitions laid down in this Act or of decisions taken by the castel authority pussuart to this Act;

12. recommends purchasers of his goods to charge or quote specified prices when reselling them to third parties, to use specific price fixing methods, or to observe certain upper or lower limits in pricing.

(2) Subsection (1) No. 11 and, where No. 1 applies, subsection (1) No. 12 shall not apply to:

1. recommendations issued by associations of small or medium-sized enterprises which are confined solely to its members, if such recommendations

   a) serve to promote the efficiency of those involved vis-à-vis large enterprises or other large-scale forms of enterprise and thereby improve the conditions of competition, and

   b) are expressly declared to be non-binding on the persons to whom they are addressed, and no economic, social or other pressure is exerted to enforce them;

2. recommendations exclusively covering the uniform application of standards and types, if

   a) the conditions of No. 1 b) are satisfied, and

   b) the recommendations have been notified to the cartel authority by the recommending party and the comments of a rationalisation organisation have been attached to the notification; the notification shall be deemed not to have been effected unless such comments are attached to it.

   Recommendations of a rationalisation organisation need neither be described expressly as non-binding nor be notified to the cartel authority;

3. recommendations issued by trade and industry associations and professional organisations which exclusively relate to the uniform application of general terms of business, delivery and payment including cash discounts within the meaning of Section 2(1); No. 1 (b) and No. 2 (b) shall apply as appropriate, the latter subject to the proviso that the comments of the trade and industry associations and professional organisations involved have to be attached to the notification.

(3) The cartel authority may declare recommendations of the nature specified in subsection (2) to be unlawful and forbid new, similar recommendations, if it determines that the conditions of subsection (2) are not, or are no longer, satisfied or that the recommendations constitute an abuse of the exemption from subsection (1) No. 11 or 12.

(4) The administrative offence may be punished by a fine of up to DM 1 million, or up to three times the additional receipts obtained as a result of the infringement, if higher. The amount of the additional receipts may be estimated.

(5) Proceedings for administrative offences pursuant to subsection (1) shall become statute-barred as set out in the Administrative Offences Act even where the offence is committed by putting publications into circulation.

Section 38a

(1) Section 38 (1) Nos. 11 and 12 shall not apply to non-binding price recommendations issued by an enterprise for the resale of its branded goods which are in price competition with similar goods of other manufacturers, if the recommendations

1. are expressly designated as non-binding, exclusively contain a certain price mark and no economic, social or other pressure is exerted to enforce them, and

2. are issued with the expectation that the recommended price will correspond to the price likely to be charged by the majority of those to whom the recommendation is addressed.

(2) Branded goods within the meaning of subsection (1) are products regarding which the price recommending enterprises guarantee delivery in consistent or improved quality and:

1. which themselves, or

2. whose packaging or presentation for delivery to the consumer, or

3. whose containers in which they are sold

are provided with a mark indicating their origin (a firm's symbol, a word or other sign).

Sentence 1 shall apply to agricultural products on the understanding that minor quality fluctuations which are due to the nature of the product and which cannot be remedied by the producer by measures that can be reasonably required of him shall be left out of account.

(3) The cartel authority may declare recommendations of the nature described in subsection (1) unlawful and forbid new, similar recommendations, if it determines that the recommendations constitute an abuse of the exemption from Section 38 (1) No. 11 or 12. An abuse is involved in particular, if

1. the recommendation alone or in combination with other restraints of competition is likely, in a manner not justified by the overall economic situation, to increase the price of the goods or prevent their prices from decreasing or restrict the production or the sale or such goods, or

2. the recommendation is likely to deceive the consumer as to the price charged by the majority of those to whom the recommendation is addressed, or

3. the recommended price in the majority of cases considerably exceeds the prices actually charged in the entire area in which this Act applies or in an essential part thereof, or

4. by distribution arrangements or other measures of the recommending enterprise, certain enterprises or certain groups of buyers are excluded from the distribution of the goods without any reason justifying such action.

(4) The cartel authority may require enterprises to furnish information insofar as is necessary to verify the conditions set out in subsection (3). Section 46 (2), (5) and (9) shall apply, as appropriate. The cartel authority shall set a reasonable time-limit for the furnishing of the information. The powers of the cartel authority under Section 46 shall remain unaffected.

(5) Prior to issuing a decision under subsection (3), the cartel authority shall request the price-recommending enterprise to discontinue the abuse which gave rise to the objection.

(6) The cartel authority may forbid an enterprise to apply recommendations of the nature specified in subsection (1), if

1. two final decisions under subsection (3), or
2. two final administrative fine decisions under Section 38 (1) No. 11 or No. 12, or
3. a final decision under subsection (3) and a final administrative fine decision under Section 38 (1) No. 11 or No. 12

have been issued against the enterprise and it is to be expected that the enterprise will continue to operate recommendations that constitute an administrative offence or an abuse. The cartel authority may remove the prohibition at the request of the enterprise, if special circumstances warrant the assumption that a renewed abuse of the nature specified in subsection (3) or a renewed administrative offence under Section 38 (1) No. 11 or No. 12 is unlikely to occur.

Section 39

(1) An offence is committed by any person who:

1. in contravention of Sections 23 (6), 38 (4) or 46, wilfully or negligently fails to furnish information, furnishes false or incomplete information, or fails to furnish information within the prescribed time, or in contravention of Section 46 fails to submit business documents, fails to submit them within the prescribed time or submits them incomplete, or refuses to permit any inspection;
2. wilfully or negligently fails to effect immediate notification pursuant to Sections 9 (2), sentence 3, 100 (1), sentence 2, or 106 (3) or to make the notification required by Section 23 (1) to (5) without delay, or when going so furnishes false or incomplete information;
3. wilfully or negligently furnishes false or incomplete information when effecting the notification under Section 24a (1), sentence 2.

(2) Such offences may be punished by fines of up to DM 50,000.

(Sections 40 - 43 were repealed by the Administrative Offences Act, 1968).

Part III

AUTHORITIES

Chapter 1

Cartel Authorities

Section 44

(1) The duties and powers assigned to the cartel authority by this Act shall be exercised:

1. by the Federal Cartel Office (Section 48)

   a) with regard to cartels within the meaning of Sections 4, 6 and 7, insofar as these duties and powers have not been assigned to the Federal Minister for Economic Affairs ;

   b) with regard to agreements of the nature specified in Section 16 and recommendations of the nature specified in Section 38a;

   c) with regard to mergers under Sections 23 to 24a, insofar as these duties and powers have not been assigned to the Federal Minister for Economic Affairs;

   d) if the effects of the influence on the market, or of the restrictive or discriminatory conduct, or a competition rule extend beyond the territory of a Land;

   e) with regard to the Federal Postal Administration and the Federal Railways;

2. by the Federal Minister for Economic Affairs in the cases defined in Sections 8 and 12 (2) in conjunction with Section 6 (1) and in Section 24 (1) in conjunction with subsections (3) to (5) ;

3. in all other cases by the supreme Land authority as determined by the laws of the Land concerned.

(2) Insofar as an administrative fine under this Act is to be imposed on insurance companies, building and loan associations, enterprises engaged in banking or savings bank transaction, or associations of such enterprises, the cartel authority shall issue the decision imposing a fine in agreement with the competent supervisory authority. If agreement cannot be reached, the cartel authority shall submit the case to the Federal Minister for Economic Affairs whose instructions shall then replace such agreement. In cases where the cartel authority as well as the competent supervisory authority are Land authorities and agreement between them cannot be reached the authority competent under the laws of the Land shall decide.

Section 45

(1) If the Federal Cartel Office institutes administrative proceedings (Sections 51 to 58) or administrative fine proceedings (Sections 81 to 86a) against an enterprise, a cartel, or a trade and industry association or professional organisation, or if it carries out investigations, it shall at the same time inform the competent supreme Land authority.

(2) If a supreme Land authority institutes administrative proceedings or administrative fine proceedings against an enterprise, a cartel, or a trade and industry association or professional organisation, or if it carries out investigations, it shall at the same time inform the Federal Cartel Office.

(3) Cases within the jurisdiction of the Federal Cartel Office pursuant to Section 44 (1) No. 1 shall be transferred to it by the supreme Land authority. Cases within the jurisdiction of the supreme Land authority pursuant to Section 44 (1) No. 3, shall be transferred to it by the Federal Cartel Office.

Section 46

(1) Insofar as is necessary to carry out its duties under this Act, the cartel authority may:

1. request from enterprises and associations of enterprises information about their economic relationships;
2. inspect and examine business documents on the premises of enterprises and associations of enterprises during normal business hours;
3. request information from trade and industry associations and professional organisations about their bylaws, their decisions, and the number and names of the members affected by the decisions.

(2) The owners of enterprises or their representatives, or, in the case of legal persons, partnerships and associations having no legal capacity, the persons designated as representatives by law, bylaws or articles of association as well as the representatives appointed pursuant to Section 36 (2), shall furnish the requested information, submit business documents, and permit examination of these documents as well as entry into the offices and business premises.

(3) Persons entrusted by the cartel authority with carrying out examinations may enter the offices of enterprises and associations of enterprises. The basic right under Section 13 of the Basic Law is hereby limited to that extent.

(4) Searches may only be carried out pursuant to an order of the local judge (Amtsrichter) who has jurisdiction at the place where the search is to be made. Sections 306 to 310 and 311a of the Code of Criminal Procedure shall apply, as appropriate, to appeals from such an order. If there is danger in delay, the persons described in subsection (3) may carry out the necessary searches during business hours without judicial order. A record concerning such search shall be made on the spot, showing the essential results of the search and, in case no judicial order was issued, also the facts which have led to the assumption that there would be danger in delay.

(5) The person who is required to furnish information may refuse to answer questions the answer to which would expose him or one of his relatives as specified in Section 383 (1) Nos. 1 to 3, of the Code of the Civil Procedure to the danger of criminal prosecution or to proceedings under the Administrative Offences Act.

(6) Requests for information issued by the Federal Minister for Economic Affairs or the supreme Land authority shall be made by written individual order, those from the Federal Cartel Office by decision. The legal basis, the subject-matter, and the purpose of the request shall be stated therein and an appropriate time limit shall be fixed.

(7) Verification shall be ordered by the Federal Minister for Economic Affairs or the supreme Land authority by written individual order, and by the Federal Cartel Office by a decision made with the consent of its President. The time, the legal basis, the subject-matter, and the purpose of the verification shall be stated in the order or decision.

(8) Repealed*

(9) The knowledge and documents obtained through any information supplied pursuant to subsection (1), Nos. 1 and 3, or through measures pursuant to subsection (1), No. 2 may not be used in tax assessment proceedings or administrative fine proceedings for minor tax or exchange control offences as well as in proceedings involving criminal tax or exchange control offences; the provisions of Sections 93, 97, 105 (1), 111 (5) in connection with Section 105 (1) as well as Section 116 (1) of the Tax Code (Abgabenordning) are not applicable to that extent. Sentence 1 shall not apply to proceedings for criminal tax offences as well as connected tax assessment proceedings if there is an overriding public interest in carrying on such proceedings or if the person required to give information or the persons acting on his behalf have wilfully given false information.

Section 47 Repealed*

Chapter 2

Federal Cartel Office

Section 48

(1) A Federal Cartel Office shall be established in Berlin as an independent higher federal authority. It shall be responsible to the Federal Minister for Economic Affairs.

The protection of business secrets has been guaranteed since January 1, 1975, by Section 203 et seq. of the Penal Code, Section 203 (2) reads as follows:

"(2) Any person who, without permission, discloses another person's secret, in particular secrets concerning individual privacy or a trade or busines. secret which has been entrusted to him in his capacity as

1. office-bearer,
2. person having special obligations in the public service
3. .....
4. member or assistant of an investigating committee, board or other committee working for the legislative bodies of the Federal Republic or a Land, or
5. officially appointed expert who has been formally bound under a law to conscientiously perform his duties,

or otherwise has come to his knowledge shall also be punished. Equal to a secret within the meaning of sentence 1 shall be isolated data on the personal or material conditions of another person which have been collected for the performance of public administration duties.

Section 203(5): if the offender acts against payment or with the intention to enrich himself or another person or to damage another person, he shall be punished by imprisonment not exceeding two years or a fine.

Section 204: (1): Any person who, without permission, uses another person's secret, in particular a trade or business secret which he is obliged to keep secret under Section 203, shall be punished by imprisonment not exceeding two years or a fine.

Section 204: (2): Section 203 (4) shall apply, as appropriate.

Section 205 (1): In the cases of Section 201 (1) and (2) and Sections 202 to 204 the offence shall be prosecuted only if a charge has been brought."

(2) Decisions of the Federal Cartel Office shall be made by decision divisions which shall be established in accordance with instructions to be issued by the Federal Minister for Economic Affairs. Otherwise the President shall determine the distribution and handling of business in the Federal Cartel Office by rules of procedure requiring confirmation by the Federal Minister for Economic Affairs.

(3) The decisions of the decision divisions shall be made by a chairman and two others members.

(4) The chairman and the other members of the decision divisions must be permanent officials. They must be qualified for holding judicial office or for senior rank in the civil service; the chairmen shall, as a rule, be qualified for holding judicial office.

(5) The members of the Federal Cartel Office must not be owners, chairmen, or members of the board of management or the supervisory board, of any enterprise, cartel, or trade and industry association or professional organisation.

Section 49

Insofar as the Federal Minister for Economic Affairs gives general instructions to the Federal Cartel Office for or against the issuance of decisions pursuant to this Act, such instructions shall be published in the Federal Gazette.

Section 50

(1) Following each year in which the Monopolies Commission has to issue an opinion under Section 24b (5) sentence 1, the Federal Cartel Office shall publish a report on its activities in the two preceding calendar years as well as on the situation and developments in its field of responsibilities. The report shall contain the general instructions given by the Federal Minister for Economic Affairs pursuant to Section 49. Furthermore, mergers notified under Section 23 shall be included in the report, insofar as they have been published in the Federal Gazette under Section 10 (1). The Federal Cartel Office shall also regularly publish its basic administrative principles.

(2) The Federal Government shall without undue delay submit the report of the cartel authority, together with its comments, to the Bundestag.

Part IV

PROCEEDINGS

Chapter 1

Administrative Proceedings

I. PROCEEDINGS BEFORE THE CARTEL AUTHORITIES

Section 51

(1) The cartel authority shall institute proceedings on its own motion or upon application.

(2) Parties to the proceedings before the cartel authority shall be:

1. those who have applied for the institution of proceedings;
2. cartels, enterprises, trade and industry associations or professional organisations against which the proceedings are directed;
3. in the cases defined by Sections 14, 19, or 105, the enterprises and associations of enterprises concerned;
4. persons and associations of persons whose interests will be substantially affected by the decision and who, upon application, have been admitted to the proceedings by the cartel authority;
5. in the cases defined by Section 23 (2) No. 1 or 2, the seller also.

(3) In proceedings before supreme Land authorities, the Federal Cartel Office shall also be a party.

Section 52

(1) If a party pleads lack of territorial jurisdiction or of jurisdiction over the subject matter on the part of the cartel authority, the latter may give a preliminary decision on this issue. Such decisions shall be subject to independent appeals to the court; the appeal shall suspend the effect of the decision.

(2) If a party has failed to plead lack of jurisdiction of the cartel authority, an appeal to the court may not be based on the assertion that the cartel authority erroneously assumed jurisdiction.

Section 53

(1) The cartel authority shall give the parties an opportunity to present their views and, upon application of one of them, summon them to an oral hearing.

(2) In appropriate cases, the cartel authority may give representatives of those economic groups which are affected by the proceedings an opportunity to present their views.

(3) In the cases specified in Section 22 the cartel authority shall decide after public oral hearings; with the consent of the parties to the proceedings, it may decide without an oral hearing. At the request of a party to the proceedings or on its own motion, the cartel authority shall exclude the public from the hearing or part of it, if it is to be feared that public order, in particular the security of the state, or an important business or manufacturing secret may be endangered. In the cases specified in Sections 24 and 24a, sentences 1 and 2 shall be applied as appropriate in proceedings before the Federal Minister for Economic Affairs.

Section 54

(1) The cartel authority may conduct any investigations and collect any evidence required.

(2) Sections 372 (1), 376, 377, 380 to 387, 390, 395 to 397, 398 (1), 401, 402, 404, 406 to 409, 411 to 414 of the Code of Civil Procedure shall apply, as appropriate, to exhibits and inspections and to testimony of witnesses and experts; detention must not be ordered. The court of appeal (Oberlandesgericht) shall decide on appeals from decisions on these matters.

(3) The testimony of witnesses shall be recorded and the record signed by the investigating member of the cartel authority; if a registrar attends, he shall also sign the record. The record shall show the date and place of the hearing as well as the names of those who conducted it and of the parties.

(4) The record shall be read to the witness for approval or shall be submitted to him for perusal. The approval given shall be recorded and signed by the witness. If he does not sign, the reason shall be stated.

(5) The provisions of subsections (3) and (4) shall apply, as appropriate, to the questioning of experts.

(6) The cartel authority may request the local court to administer the oath to witnesses, if this is considered necessary for obtaining a truthful statement. The administration of the oath shall be decided upon by the court.

Section 55

(1) The cartel authority may seize material which can be of importance as evidence in the investigation. The person affected by the seizure shall be informed without delay.

(2) Within three days of the seizure, the cartel authority shall request the judicial confirmation of the local court having jurisdiction at the place where the seizure was carried out, if neither the affected person nor an adult relative was present during the seizure, or if the affected person or, in his absence, an adult relative of the affected person has explicitly objected to the seizure.

(3) The affected person may at any time ask for a judicial review of the seizure. He shall be informed of this right. The court having jurisdiction under subsection 2 shall rule on the motion.

(4) Against this ruling an appeal may be made. Sections 306 to 310 and 311a of the Code of Criminal Procedure shall apply as appropriate.

Section 56

Pending a final decision regarding:

1. an authorisation under Sections 4, 5 (2) and (3), 6 (2), 7, 8, 20 (3), 21 or 24 (3), its extension under Section 11 (2), its revocation or modification under Section 11 (4) or (5),

2. an authorisation under Section 14,

3. a decision under Section 3 (4), Section 12 (3), Section 17 (1), Sections 18, 22 (5), Section 24 (2) sentence 1 and (5) to (7), Sections 27, 31 (3), Sections 37a, 38 (3), Section 38a (3) or (6), Section 102 (4) or (5), Sec (2), Section 103 (6), Section 103a (3) or Section 104 (2),

the cartel authority may issue preliminary orders for the purpose of regulating matters on a temporary basis.

Section 57

(1) The cartel authority shall state the reasons for its decisions. The decisions, with such reasons and with information on available legal remedies, shall be served on the parties pursuant to the provisions of the Administrative Service Act of 3 July 1952 (Legal Gazette I, p. 379). Decisions which are rendered in proceedings under Sections 22 to 24a and which are directed at enterprises located outside the area of application of this Act shall be served by the cartel authority on the person whom the enterprise has authorised to accept service. If the enterprise has not named such a person, the cartel authority shall serve the decisions by publication in the Federal Gazette.

(2) Insofar as proceedings are terminated otherwise than by a decision served upon the parties pursuant to subsection (1), sentences 2 to 4, the parties shall be informed in writing of the termination of the proceedings.

Section 58

Decisions of the cartel authority:

1. by which an application for authorisation of agreements or decisions of the nature specified in Sections 1, 5 (2) and (3), 6 (2), 7, and 8, or an application for registration of a competition rule is rejected,

2. which contain an objection raised by the cartel authority under Sections 2 (3), 3 (3), 5a (3), or 5b (2);

3. which contain a final prohibition under Section 24 (2), sentence 1, an authorisation under Section 24 (3), a rejection, modification, revocation or withdrawal thereof, or which are taken under Section 24 (6) or (7);

4. which are taken under Section 12 (3), Section 17 (1), Sections 18, 22 (5), Sections 27, 38 (3), Section 38a (3) or (6), Section 102 (4) or (5), Section 102a, Section 103 (6), Section 103a (3) or Section 104 (2),

shall be published in the Federal Gazette, and if the decision was made by a supreme Land authority, it shall also be published in a gazette of the respective Land.

Sections 59 - 61

(Deleted).

II. APPEAL TO THE COURT

Section 62

(1) There shall be a right of appeal to the court against decisions of the cartel authority. An appeal may also be based on new facts and evidence.

(2) Such appeal may be made by any party to the proceedings before the cartel authority (Section 51 (2) and (3)).

(3) Such appeal may also be made if the cartel authority fails to make the decision requested in an application and the applicant claims that he has a right to demand such a decision. An unjustified failure to rule on an application within a reasonable time shall also be deemed a failure to act. Such failure to act shall then be deemed a rejection of the application.

(4) The court of appeal in whose district the cartel authority is located and in the cases specified in Sections 24 and 24a, the court of appeal in whose district the Federal Cartel Office is located, shall have exclusive jurisdiction over such appeals; this shall also apply to appeals against a decision of the Federal Minister for Economic Affairs. Section 36 of the Code of Civil Procedure shall apply as appropriate.

Section 63

(1) The appeal shall suspend the effect of the decision appealed against, insofar as the decision:

1. revokes, withdraws or amends an authorisation granted under Sections 11 (4) and (5) or 24 (5), or

2. is issued under Section 3 (4), Section 12 (3), Section 17 (1), Sections 18, 20 (3) sentence 2, Section 22 (5), Sections 27, 31 (3), Sections 37a, 37b (1), Section 38 (3), Section 102 (4) or (5), Section 102 a (2), Section 103 (6), Section 103a (3) or Section 104 (2).

(2) If an appeal is made against a decision granting an authorisation under Section 14 or from a preliminary order under Section 56, the appellate court may order that the contested decision or a part thereof shall take effect only upon completion of the appeal proceedings, or upon the furnishing of security. Such order may be revoked or amended at any time.

(3) Section 56 shall apply, as appropriate to the proceedings before the appellate court.

Section 63a

(1) In the cases defined by Section 63 (1) the cartel authority may order the immediate enforcement of the decision, if this is required by the public interest or the overriding interest of a party to the proceedings.

(2) Orders under subsection (1) may be issued even prior to the lodging of the appeal.

(3) Upon application, the appellate court may restore the suspensive effect of the appeal in full or in part, where:

1. the conditions for issuing an order under subsection (1) have not been satisfied or are no longer satisfied, or

2. there are serious doubts as to the legality of the contested decision, or

3. the enforcement would result for the party concerned in undue hardship not required by overriding public interests.

In cases where the appeal has no suspensive effect, the cartel authority may suspend the enforcement; it shall do so if the conditions of sentence 1 No. 3 are met. Upon application, the appellate court may order the suspensive effect in full or in part, if the conditions of sentence 1 No. 2 or 3 are met.

(4) An application under subsection (3) sentence 1 or 3 may be filed prior to the lodging of the appeal. The applicant shall substantiate the facts on which the application is based. If the decision has already been enforced at the time when the application is decided on, the court may also order the enforcement measures to be rescinded. The restoration and the ordering of the suspensive effect may be made conditional upon the provision of security or upon other conditions. A time-limit may also be set.

(5) Decisions on applications filed under subsection (3) may be amended or revoked at any time. Insofar as the applications are granted by them, they shall be final.

Section 64

If a decision granting an authorisation pursuant to Section 14 is amended or revoked upon appeal, any parties who have acted on the strength of the contested decision shall be liable to compensate the affected person for any damage he has suffered as a result of such action. The right to compensation shall become statute-barred six months from the service of the final decision on the person concerned.

Section 65

(1) The appeal to the court shall be delivered in writing, within one month, to the cartel authority against whose decision it is made. The said period shall run from the service of the decision of such authority. If in the cases specified in Section 24 (2) an application for an authorisation under Section 24 (3) is filed, the period for the appeal against the Federal Cartel Office's decision under Section 24 (2), sentence 1, shall run from the service of the decision issued by the Federal Minister for Economic Affairs under Section 24 (3). Arrival of the appeal at the appellate court within the above period shall be sufficient.

(2) If no decision is rendered on an application (Section 62 (3), sentence 2), the appeal shall not be subject to any time-limit.

(3) The appellant shall state the grounds of appeal. Such statement shall be filed within one month from the lodging of the appeal; the period may be extended, upon application, by the presiding judge of the appellate court.

(4) The statement of grounds of appeal shall indicate:

1. to what extent review of the decision is requested and what parts thereof should be amended or revoked;

2. the facts and evidence on which the appeal is based.

(5) The appeal and the statement of grounds of appeal must be signed by a lawyer admitted to practice in a German court; this shall not apply to appeals made by cartel authorities.

Section 66

(1) Parties to the proceedings before the appellate court shall be:

1. the appellant,
2. the cartel authority against whose decision the appeal is made,
3. persons and associations of persons whose interests are substantially affected by the decision and who, upon application, have been admitted to the proceedings by the cartel authority.

(2) If the appeal is against a decision of a supreme Land authority, the Federal Cartel Office shall also be a party.

Section 67

(1) Before the appellate court the parties must be represented by a lawyer admitted to practice in a German court. The cartel authority may be represented by one of its members.

(2) On the application of a party, a qualified accountant or any other expert holding a written power of attorney shall be permitted to address the court. Section 157 (1) and (2) of the Code of Civil Procedure shall not apply to that extent.

Section 68

(1) The appellate court shall decide on the appeal after an oral hearing; with the consent of the parties the decision may be made without an oral hearing.

(2) If the parties have been duly summoned and have failed to appear or to be properly represented at the date set for the hearing, the case may nevertheless be heard and decided.

Section 69

(1) The appellate court shall investigate the facts on its own motion.

(2) The presiding judge shall ensure that formal defects be eliminated, vague applications be explained, that applications submitted be relevant, insufficient factual statements be completed, and, further, that all explanations be given which are essential for ascertaining and evaluating the facts.

(3) The appellate court may direct the parties to file statements within a specified time on points needing clarification, to give particulars of evidence, and to submit documents and other evidence in their possession. If necessary action is not taken within such time, a decision may be made on the basis of the record regardless of the missing evidence.

Section 70

(1) The appellate court shall issue its decision in the form of a decree, based on the conclusions freely reached by it on the entire record of the case. The decree may only be based on facts and evidence on which the parties have had an opportunity of being heard.

(2) If the appellate court considers the decision of the cartel authority improper or unfounded, it shall revoke the decision. If the decision has been withdrawn or otherwise disposed of in the meantime, the appellate court shall, upon application, determine that the decision was improper or unfounded if the appellant has a legitimate interest in such determination.

(3) If a decision under Section 22 (5) or Section 103 (6) has been disposed of by subsequent changes in the actual circumstances or otherwise, the appellate court shall, upon application, declare whether, to what extent and until what time the decision was founded.

(4) If the appellate court considers a denial of or failure to issue a decision to be improper or unfounded, it shall declare that the cartel authority has the duty to issue the decision applied for.

(5) A decision shall also be deemed improper or unfounded if the cartel authority has exercised its discretion erroneously, particularly if it has exceeded the legal limits of its discretion or has exercised its discretion in such a way as to violate the meaning and purpose of this Act. The appraisal by the cartel authority of the general economic situation and trends shall not be subject to review by the court.

(6) The decree shall state the reasons on which it is based and shall be served on the parties with information as to available legal remedies.

Section 71

(1) The parties referred to in Section 66 (1) Nos. 1 and 2 and (2) may inspect the files of the court and may, at their own expense, obtain certified or other copies and extracts from the court office. Section 299 (3) of the Code of Civil Procedure shall apply as appropriate.

(2) Inspection of supplementary files, of expert opinions, and of other information may take place only with the consent of the agency to which the documents belong or which had obtained the information. The cartel authority shall refuse its consent to the inspection of its documents insofar as this appears necessary for substantial reasons, especially in order to safeguard manufacturing, operating or business secrets. If the inspection is refused or not permissible, the documents involved may be used as the basis for a decision only insofar as their contents have formed part of the pleadings.

(3) The appellate court may permit inspection of documents to the same extent by the parties specified in Section 66 (1) No. 3 after the agency involved has been heard.

Section 72

Except as otherwise provided, the following rules shall apply, as appropriate, to proceedings before the appellate court:

1. the provisions of Sections 169 to 197 of the Administration of Justice Act concerning the admission of the public to the proceedings, the maintenance of order in court, the language or languages to be used in court, the deliberation and voting of the court;

2. the provisions of the Code of Civil Procedure concerning the exclusion and challenge of a judge, the right of the parties to be represented or assisted, service of documents by the court, summons, dates of hearings and time-limits, orders for personal appearance of the parties, consolidation of several proceedings, the taking of evidence of witnesses and experts, other means of taking evidence, and relief against failure to observe time-limits.

III. APPEALS ON POINTS OF LAW

Section 73

(1) Against decisions of the courts of appeal (Oberlandesgerichte) upon the merits, an appeal on points of law may be filed with the Federal Supreme Court (Bundesgerichtshof) if the court of appeal has granted leave to appeal.

(2) Leave to appeal on points of law shall be granted, if

1. a point of law of fundamental importance is to be decided, or

2. a decision of the Federal Supreme Court is required for the development of the law or to ensure uniform court practice.

(3) The decision of the court of appeal shall state whether or not leave to appeal is granted. The reasons for a refusal of leave shall be given.

(4) No leave to appeal against a decision of the appellate court shall be required if such appeal is based on one of the following procedural defects:

1. if the court which made the decision was not composed according to law;

2. if a judge participated in the decision who was excluded by law from the exercise of judicial functions or was successfully challenged on grounds of prejudice;

3. if a party was denied its legal right to be heard;

4. if a party was not represented in the proceedings in accordance with the provisions of the law, unless such party had explicitly or by implication consented to the conduct of the proceedings;

5. if the decision was made upon an oral hearing at which the provisions concerning the admission of the public to the proceedings were violated;

6. if the decision does not give the reasons on which it is based.

Section 74

(1) A separate appeal may be made against the refusal of leave to appeal on points of law.

(2) Such an appeal shall be decided by the Federal Supreme Court by way of a decree setting forth the reasons on which it is based. The decree may be issued without an oral hearing.

(3) Such appeal from a refusal of leave to appeal shall be made in writing and be lodged with the court of appeal within one month. The said period shall run from the date of service of the contested decision.

(4) Sections 63 (1) and (2), 65 (3), (4) No. 1, and (5), 66, 67 (1), 71 and 72 No. 2 of this Act as well as Sections 192 to 197 of the Administration of Justice Act with respect to the deliberation and voting of the court shall apply, as appropriate, to such appeal. The issuing of preliminary orders shall come within the competence of the appellate court.

(5) If leave to appeal on points of law is refused, the decision of the court of appeal shall become effective from the date of service of the decree issued by the Federal Supreme Court. If leave is granted, the period for filing such appeal shall run from the service of the decree issued by the Supreme Court.

Section 75

(1) An appeal on points of law may be filed by the cartel authority or any party to the appeal proceedings.

(2) Such an appeal may be based only on the contention that the decision constitutes a violation of the law; Sections 550 and 551, Nos. 1, 2, 3, 5, 6, 7 of the Code of Civil Procedure shall apply as appropriate. An appeal on points of law may not be based on the contention that the cartel authority has erroneously assumed jurisdiction in breach of Section 44.

(3) Such an appeal shall be made in writing and be lodged with the court of appeal within one month. The period shall run from the service of the contested decision.

(4) The Federal Supreme Court shall be bound by the findings of fact made in the decision involved, unless, with regard to these findings, admissible and justified grounds of appeal on a point of law are established.

(5) In addition, Sections 63 (1) and (2), 65 (3), (4) No. 1 and (5), 66 to 68 and 70 to 72 shall apply, as appropriate, to such appeal. The issuing of preliminary orders shall come within the competence of the appellate court.

IV. GENERAL PROVISIONS

Section 76

In addition to natural and legal persons, associations of persons which do not have legal capacity may also participate in proceedings before the cartel authority, in appellate court proceedings, and in appeal proceedings on points of law.

Section 77

In appellate court proceedings and in appeal proceedings on points of law, the court may order that the proper costs of the case shall be reimbursed, in whole or

in part, by a party if equity so requires. If a party has caused costs to be incurred by an unfounded appeal or by gross misconduct or default, the costs shall be borne by such party. Otherwise, the provisions of the Code of Civil Procedure regarding the taxation of costs and the recovery of taxed costs shall apply as appropriate.

Section 78

(1) The provisions concerning civil actions shall apply, as appropriate, to fees and expenses in appellate court proceedings and appeal proceedings on points of law; the fee for judgments shall be charged for decrees under Section 70. The fees in appellate court proceedings shall be determined by the provisions regarding the court of appeal (Berufungsinstanz); the fees in proceedings involving appeals on points of law shall be determined by the provisions regarding the court handling reviews on points of law (Revisionsinstanz).

(2) In appellate court proceedings or appeal proceedings on points of law instituted by a person admitted to the proceedings (Section 51 (2) No. 4) the value in dispute shall be determine at discretion according to the importance of the matter to such person as evidenced by his application, but it shall not exceed DM 500,000.

Section 79

The following Section 65 a shall be inserted in the Federal Act on Lawyers' Fees after Section 65:

Section 65a. Proceedings Under the Act Against Restraints of Competition.

The provisions of this section shall apply, as appropriate, to appellate court proceedings and to proceedings involving appeals on points of law under the Act Against Restraints of Competition. The fees shall be determined under Section 11 (1), sentence 2.

Section 80

(1) The detailed procedure before the cartel authority shall be laid down by the Federal Government by ordinance requiring the consent of the Bundesrat.

(2) Fees shall be charged in proceedings before the cartel authority to cover the administrative expenses. The following shall be subject to fees (chargeable acts):

1. notifications under Section 9 (2) - also in conjunction with Section 99 (3) sentence 1 and Section 103 (3) and Section 103a (1) sentence 2, Section 21a (1), Section 38 (2) Nos. 2 and 3, Section 99 (3) sentence 3 and subsection (4), Section 100 (1) sentence 2, Section 102 (1) No. 1 (b), also in conjunction with subsection (5), as well as Section 102a (1) sentence 3 in conjunction with sentence 1 ;

2. official acts pursuant to Section 3 (4), Sections 4, 5 (2) and (3), Sections 6 (2) and (3), Sections 7, 8, 11, 12, 14, 17, 18, 20 and 27 (3), to 22, 24, 24a, 27, 28, 31, 37a, 38 (3), Section 38a (3) or (6), Sections 56, 91, 102, 102a (2), Sections 103, 103a, 104 and 105 ;

3. the furnishing of copies from the files of the cartel authority or from the registers kept by it.

In addition, the costs of public notices shall be charged. The fee for official acts pursuant to Section 6 (2) shall not be charged if the cartel authority has already granted an authorisation under Section 6 (4) for the agreement or decision. In the cases defined by Section 27 (3) in conjunction with Section 11 (4) No. 1 the fee will only be charged if the application is rejected. The fee for the notification of a merger under Section 24a (1) shall be credited against the fee for the prohibition of a merger under Section 24 (2), sentence 1.

(3) The amount of the fees shall be determined by the material, work and time expended by the cartel authority, account being taken of the economic importance of the subject-matter of the chargeable act. However, the fee rates shall not exceed:

1. DM 50,000 in the cases defined by Sections 24 and 24a;
2. DM 25,000 in the cases defined by Sections 4, 5 (2) and (3), 6 (2), 7, 8 and 22 (5);
3. DM 15,000 in the cases defined by Sections 2 and 3;
4. DM 7,500 in the cases defined by Sections 5a and 5b;
5. DM 5,000 in the cases defined by Section 6 (1), Section 17 (1), Sections 18, 20 (3), Sections 21, 28 (3), Section 38 (3), Section 38a (3) and (6), Section 99 (3) sentence 1, Section 102 (4), Section 102a (2), Section 103(6), Section 103a (3) and Section 104 (2);
6. DM 2,500 in the cases defined by Section 5 (1), Section 27 (1), Sections 37a, 99 (3) sentence 3, Section 100 (1) sentence 2, Section 102 (1) No. 1 (b), also in conjunction with subsection (5), Section 102a (1), sentence 3 and Section 103 (5) and Section 103a (1) sentence 2;
7. DM 1,250 in the cases defined by Section 38(2) Nos. 2 and 3;
8. DM 1,000 in the cases defined by Section 17(1), insofar as this provision is applied, as appropriate, to price recommendations;
9. DM 500 in the cases defined by Sections 5 (4), 91 (1);
10. DM 250 in the cases defined by Section 99 (4), sentence 2;
11. DM 25 for the furnishing of certified copies (subsection (2) No. 3);
12. (a) in the cases defined by Sections 6 (4), 11, and 27 (3), the amount for the granting of the authorisation or the order directing admission (Nos. 2 and 6);
    (b) in the cases defined by Sections 12 and 104, the amount for the notification (Nos. 3 to 6) and DM 250 for decisions with regards to agreements or decisions of the nature specified in Section 100 (1) and (7);
    (c) in the cases defined by Sections 14, 105, 2% of the value of the security;
    (d) in the case defined by Section 31 (3), the amount for the decision under Section 28 (3) (No. 5);
    (e) in the cases defined by Section 56, one-fifth of the fee in the main issue.

If the amount of material, work and time expended by the cartel authority is extremely heavy in a particular instance, considering the economic importance of the chargeable act, the fee may be increased to up to twice its amount. For reasons of equity the fee determined on the basis of sentences 1 to 3 may be reduced to one-tenth of its amount.

(4) As regards payment for several similar official acts or similar notifications effected by the person liable to pay the fees, provision may be made for lump-sum fee rates which allow for the small amount of administrative efforts involved.

(5) Fees must not be charged:

1. for oral and written information and suggestions;
2. if they would not have arisen had the matter been handled properly;
3. in the cases defined by Section 24 (3), if the preceding decision of the Federal Cartel Office under Section 24 (2), sentence 1, has been revoked.

(6) If an application is withdrawn before it has been decided on, half of the fee shall be paid. The same shall apply, if a notification is withdrawn within three months from its receipt by the cartel authority.

(7) The person liable to pay the fees shall be :

1. in the cases defined by subsection (2), sentence 2, No. 1, the notifying party;
2. in the cases defined by subsection (2), sentence 2, No. 2, the person who has caused the cartel authority to act by filing an application, or the person against whom the cartel authority has issued a decision;
3. in the cases defined by subsection (2), sentence 2, No. 3, the person who has caused the copies to be made;
4. in the cases defined by Section 27 (2) in conjunction with Section 11 (3), No. 1, the enterprise admitted by order of the cartel authority when the decision is made.

The person liable to pay the fees shall also include anyone who has agreed to pay the fees by a declaration made before the cartel authority or communicated to it, or anyone who is liable by law for the fees owed by another person. Several persons who owe fees shall be liable as joint and several debtors.

(8) The claim to payment of fees shall become statute-barred four years after they have been fixed. The entitlement to reimbursement of costs shall become statute-barred four years after they have arisen.

(9) The Federal Government is empowered to regulate, by ordinance requiring the consent of the Bundesrat, the fee rates and the collection of fees from persons liable to pay fees under the provisions of subsections (2) to (7) and reimbursement of the cost of the notices referred to in Sections 10, 32, and 58. In this context it may also make regulations regarding the exemption from costs of public bodies, the periods of limitation and collection of costs.

(10) Detailed instructions as to the reimbursement of costs arising from proceedings before the cartel authority shall be issued, in accordance with the principles laid down in Section 77, by the Federal Government by ordinance requiring the consent of the Bundesrat.

Chapter 2

Proceedings concerning Administrative Fines

Section 81

In cases of administrative offences under Sections 38 and 39 the competent cartel authority pursuant to Section 44 shall be the administrative authority within the meaning of Section 36 (1), No. 1 of the Administrative Offences Act.

Section 82

(1) The court decision on an administrative offence under Section 38 or 39 shall be made by the court of appeal (Oberlandesgericht) in whose district the competent cartel authority is located. Section 140 (1) No. 1 of the Code of Criminal Procedure in conjunction with Section 46 (1) of the Administrative Offences Act shall not apply.

(2) The decisions of the court of appeal shall be made by three judges including the president.

Section 83

The Federal Supreme Court shall decide on appeals on points of law (Section 79 of the Administrative Offences Act). If the decision appealed against is reversed without a decision on the merits of the case, the Federal Supreme Court shall refer the case to the court of appeal whose decision has been reversed.

Section 84

A retrial on a decision of the cartel authority imposing an administrative fine (Section 85 [illegible] of the Administrative Offences Act) shall be heard by the court having jurisdiction under Section 82.

Section 85

The court decisions which are necessary to enforce a decision imposing an administrative fine (Section 104 of the Administrative Offences Act) shall be made by the court having jurisdiction under Section 82.

Section 86

(Repealed)

Section 86a

(Repealed)

Chapter 3

Civil actions

Section 87

(1) The district courts (Landgerichte) shall have exclusive jurisdiction in civil actions arising under this Act or under cartel agreements or cartel decisions, regardless of the amount in dispute.

(2) Such actions shall be commercial matters within the meaning of Sections 93 to 114 of the Administration of Justice Act.

Section 88

Another cause of action may be joined with one arising under this Act or under cartel agreements or cartel decisions (Section 87), if the former has a legal or direct economic connection with an action to be brought in the court having jurisdiction under Section 87; this provision shall also apply if the other cause of action comes within the exclusive jurisdiction of one court.

Section 89

(1) The Land governments shall be empowered to assign, by ordinances, civil actions for which the district courts have exclusive jurisdiction pursuant to Section 87 to one district court so as to cover the districts of several districts courts, if such centralisation serves the administration of justice in cartel matters, in particular the uniform administration of the law. The Land governments may delegate this power to their departments of justice.

(2) Jurisdiction of one district court over specific districts or over the entire territory of several Laender may be established by treaties between the Laender.

(3) In the courts designated pursuant to subsection (1) or (2), the parties may also be represented by lawyers admitted to the court which, but for the provisions of subsections (1) and (2), would have had jurisdiction over the action.

Section 90

(1) The courts shall inform the Federal Cartel Office of all actions arising under cartel agreements or cartel decisions. They shall forward to the Federal Cartel Office copies of all pleadings, records, and decisions if so requested.

(2) Should the President of the Federal Cartel Office consider it in the public interest, he may appoint a member of the Federal Cartel Office or, if the action affects one of the enterprises specified in Section 102, a member of the competent supervisory authority, to act as his representative, who shall be authorised to submit written statements to the court, to draw its attention to facts and evidence, to attend and present arguments at such hearings, and to put questions to parties, witnesses, and experts. The parties shall be informed by the court of all written statements submitted by such a representative.

(3) If the importance of the action does not extend beyond the territory of a Land, the supreme Land authority shall take the place of the Federal Cartel Office for the purpose of the provisions of subsection (1), sentence 2, and (2).

(4) Subsections (1) and (2) shall apply, as appropriate, to court actions to enforce adherence to a fixed price within the meaning of Section 16 brought by a purchaser contractually bound to observe such a price or by another enterprise.

Section 91

(1) Arbitration agreements covering future legal disputes arising from agreements or decisions of the nature described in Sections 1 to 5b, 7, 8, 29, 99 (2) Nos. 1a to 4, 100, 102, 102a, and 103, or from claims within the meaning of Section 35 shall be null and void, unless they permit each contracting party to bring a dispute before the ordinary courts instead of the arbitration tribunal. Arbitration agreements on future legal disputes arising from agreements or decisions of the nature specified in Section 6 which do not permit each contracting party to bring a dispute before an ordinary court instrad of the arbitration tribunal shall be of no effect, unless an authorisation is granted by the cartel authority, upon application.

(2) Section 1027 (2) and (3) of the Code of Civil Procedure shall not apply to cases where arbitration agreements are concluded, within the meaning of subsection (1), with regard to pending legal disputes.

(3) Section 14 (1), sentence 3, of the Act on the Exploitation of Copyrights and Related Rights of 9 September 1965 (Legal Gazette I, p. 1294) shall remain unaffected.

Chapter 4

General Provisions

Section 92

At each court of appeal (Oberlandesgericht) a cartel section (Kartellsenat) shall be established. It shall decide on the matters referred to it pursuant to Sections 54 (2), sentence 2, 62 (4), 82, 84 and 85, as well as on appeals from final judgments and from other decisions of the district courts having jurisdiction pursuant to Sections 87 and 89.

Section 93

(1) If several courts of appeal exist in one Land, the Land government may, by ordinance, assign the matters for which the courts of appeal have exclusive jurisdiction pursuant to Sections 54 (2), sentence 2, 62 (4), 82, 84 and 85, to one or more courts of appeal or to the supreme court of the Land (Oberstes Landesgericht), if such centralisation serves the administration of justice in cartel matters, in particular the uniform administration of the law. The Land governments may delegate this power to their departments of justice.

(2) Jurisdiction of one court of appeal or supreme court of a Land over specific districts or the entire territory of several Laender may be established by treaties between the Laender.

Section 94

Section 93 (1) and (2) shall apply, as appropriate, to decisions on appeals from final judgments and from other decisions of the district courts having jurisdiction pursuant to Sections 87 and 89. Section 89 (3) shall apply as appropriate.

Section 95

(1) At the Federal Supreme Court (Bundesgerichtshof) a cartel section (Kartellsenat) shall be established to decide on the following:

1. in administrative proceedings: appeals on points of law from decisions of the courts of appeal (Sections 73 and 75) and appeals from a refusal of leave to appeal (Section 74);
2. in proceedings concerning administrative fines: appeals on points of law from decisions of the courts of appeal (Section 83);
3. in civil actions arising under this Act or under agreements and decisions described in Sections 1 to 8 and 29:
   a) reviews on points of law of final judgments of the courts of appeal;
   b) reviews on points of law of final judgments of the district courts in cases falling within Section 566a of the Code of Civil Procedure;
   c) appeals from decisions of the courts of appeal in cases falling within Section 519b (2) of the Code of Civil Procedure.

(2) The cartel section shall perform the functions of a criminal section (Strafsenat) within the meaning of Sections 132 and 136 of the Administration of Justice Act in proceedings concerning administrative fines and the functions of a civil section (Zivilsenat) in all other proceedings.

Section 96

(1) The jurisdiction of the courts designated under this Act shall be exclusive.

(2) Where the decision in any action depends, in whole or in part, on a decision to be made under this Act, the court shall stay the proceedings until a decision has been made by the authorities or courts having jurisdiction under this Act. Any party to such action may apply to the proper authorities for the decisions considered necessary by the court.

Section 97

(Repealed)

Part V

SCOPE OF THE ACT

Section 98

(1) This Act shall also apply to enterprises which are wholly or partly public property or which are managed or operated by public authorities, except as otherwise provided in Sections 99 to 103.

(2) This Act shall apply to all restraints of competition which have effect in the area in which this Act applies, even if they result from acts done outside such area. It shall also apply to export cartels as defined by Section 6 (1) insofar as their membership includes enterprises located in the area of application of this Act.

Section 99

(1) This Act shall not apply to agreements of the Federal Postal Administration including the Land Post Office in Berlin, of the Federal Railways or other public railways, or of enterprises engaged in the transportation and in the arrangement of transportation of goods and persons, or to decisions and recommendations of associations of such enterprises pertaining to transportation services and connected services, if and insofar as the tariffs or conditions based on those agreements, decisions, or recommendations are established or approved by or pursuant to an Act or ordinance; the same exemption shall also apply insofar as agreements and decisions whose contents are affected by this Act require special approval pursuant to other legal provisions.

(2) Sections 1, and 15 to 18 shall not apply to:

1. agreements of enterprises engaged in sea, coastal or inland water navigation and of airlines, or to decisions and recommendations of associations of such enterprises, if and insofar as they pertain to transportation across the borders or outside the area to which this Act applies, or to other agreements, decisions and recommendations of such enterprises and associations if they conduce to the direct implementation thereof;

1a. to agreements of enterprises or decisions and recommendations of associations of such enterprises engaged in the conveyance of passengers, if and insofar as they promote the facilities necessary for purposes of public transport and the satisfactory use of, extension of or changes in transport services within the meaning of Section 8 (3) of the Passenger Conveyance Act;

2. agreements of seaport or airport enterprises, or to decisions and recommendations of associations of such enterprises, pertaining to conditions and tariffs for the use of their services or installations;

3. agreements of enterprises, or decisions and recommendations of associations of such enterprises, which pertain to the transshipment, transportation, or storage of goods or to connected services in German airports, seaports, and inland ports and arrangements for such services, or to brokerage or the despatch of sea and inland vessels including towing services;

4. agreements of enterprises engaged in coastal and inland water navigation, or to decisions and recommendations of associations of such enterprises, insofar as they are limited to establishing, in the interest of orderly traffic, transportation conditions and time-tables for passenger vessels and to regulating the allocation of freight and goods to be towed.

(3) Section 9 (2) to (7) shall apply, as appropriate, to agreements and decisions of the nature described in subsection (2), Nos. 2 to 4. Decisions and agreements referred to in subsection (2) Nos. 2 and 3 shall not be entered in the Cartel Register.

(4) To become effective, agreements, decisions or recommendations of the nature described in subsection (2), No. 1a and amendments or additions thereto shall require notification to the approving authority, which shall forward such notification to the cartel authority. Decisions under this Act relating to agreements, decisions or recommendations of the nature described in subsection (2), No. 1a shall be made by the cartel authority in agreement with the approving authority.

Section 100

(1) Section 1 shall not apply to agreements and decisions of producers, associations of producers, and federations of producers' associations, insofar as they pertain, without fixing prices, to the production or sale of agricultural products or to the use of joint facilities for the storage or processing of agricultural products. The cartel authority shall be notified forthwith of any such agreements and decisions of federations of producers' associations. They shall not exclude competition.

(2) Section 15 shall not apply, insofar as agreements concerning agricultural products pertain to sorting, marking, or packing.

(3) Section 15 shall not apply, insofar as

1. producers or associations of producers, by legal or economic means, bind the buyers of any seed which is subject to the provisions of the Seed Act published on 23 June 1975 (Legal Gazette I, p. 1453), or

2. breeders or associations of breeders recognised under the Act on Animal Breeding of 20 April 1976 (Legal Gazette I, p. 1045), by legal or economic means, bind the buyers of animals destined for multiplication in a multi-stage breeding process, to charge certain resale prices or to impose the same obligation upon their own customers down to the resale to the ultimate consumer.

(4) Section 18 shall not apply to agreements between producers or associations of producers on the one hand, and enterprises or associations of enterprises on the other, insofar as the agreements pertain to the production, storage, processing, or sale of agricultural products.

(5) The following shall be agricultural products within the meaning of this Act:

1. products of agriculture, fruit and vegetable growing, horticulture, viticulture, and beekeeping, as well as products obtained by fishing;

2. goods obtained by the processing or conversion of products described under No. 1, processing of which is usually done by producers or associations of producers and which are listed in an ordinance to be issued by the Federal Government with the consent of the Bundesrat.

(6) Producers within the meaning of this Act shall be enterprises which produce or obtain the products referred to in subsection (5), No. 1. Enterprises engaged in plant or animal breeding or operating at the same stage shall also be considered to be producers.

(7) Section 1 shall not apply to decisions of associations of forestry enterprises, insofar as they pertain, without fixing prices, to the production or sale of forestry products. The following shall be deemed to be associations of forestry enterprises: forestry corporations, forestry co-operatives, forestry associations, property co-operatives, and similar associations whose sphere of activity does not, or does not significantly exceed the boundaries of a forest district or parish, and which are or have been established for the joint implementation of forest management measures.

(8) This Act shall not apply, insofar as the following Acts and the regulations issued thereunder permit restraints of competition prohibited under Part I of this Act :

1. Grain Act as published on 3 August 1977 (Legal Gazette I, p. 1521),
2. Sugar Act, revised version as published in the Legal Gazette Part III, No. 7844-1, and as last amended by the Act of 14 December 1976 (Legal Gazette I, p. 3341),
3. Milk and Fat Act, revised version as published in the Legal Gazette Part III, No. 7842-1, and last amended by the Act of 14 December 1976 (Legal Gazette I, p. 3341).
4. Cattle and Meat Act as published on 21 March,1977 (Legal Gazette I, p. 477).

Section 101

This Act shall not apply:

1. to the German Federal Bank and the Reconstruction Loan Corporation;
2. insofar as provision of services or payment is regulated under the Spirits Monopoly Act of 8 April 1922 (Legal Gazette of the Reich I, p. 335, 405), and the Matches Monopoly Act of 29 January 1930 (Legal Gazette of the Reich I, p. 11) and the ordinances issued under these Acts;
3. insofar as the Treaty Establishing the European Coal and Steel Community of 18 April 1951 contains special provisions.

Section 102

(1) Sections 1, 15 and 38 (1) No. 11 shall not apply to agreements and recommendations of credit institutions or insurance companies as well as to decisions and recommendations of associations of such enterprises, if

1. the agreement, decision or recommendation
   a) is related to acts which are subject to approval or supervision by the Federal Supervisory Office for Credit Institutions, by the Federal Supervisory Office for Insurance Companies, or by the Land Insurance Supervisory Authorities, insofar as the latter have supervision under the Act on the Supervision of Private Insurance Companies.
   b) has been notified to the competent supervisory authority, which shall forward a copy of the notification to the cartel authority, and

2. a period of three months has expired.

Expiry of the period mentioned in sentence 1 shall not affect the application of subsection (4) as well as Sections 22 and 26. Agreements as defined by Section 15 and the joint assumption of individual risks in the joint insurance and reinsurance business as well as in syndicate activities of credit institutions shall not require notification.

(2) The supervisory authority shall issue instructions concerning the contents of the notification. The notification shall state the reasons for the restraint of competition. The notification shall only be deemed to be effected if it meets the conditions laid down by the supervisory authority and contains the reasons for the restraint of competition.

(3) The notified agreements, decisions and recommendations shall be published by the cartel authority in the Federal Gazette. As to the contents of the publication, Section 9 (4) Nos 3, 5 and 6 shall apply as appropriate ; in the case of recommendations the publication shall also state who has notified them and to whom they are directed. In doing so, the Federal Government shall consider legitimate interests of third parties; for this reason and in cases where the restraint of competition is clearly negligible, it may renounce publication or make it at a later date. Within the three-month period, the cartel authority shall give the enterprises affected by the restraint of competition an opportunity to present their views. Sentence 4 and subsection (1) sentence 1 No. 2 shall not apply where the competent supervisory authority, in agreement with the cartel authority, determines that it is justified to carry out the notified agreement or decision or the recommendation at a specified earlier date.

(4) In the cases defined in subsection (1), the cartel authority may prohibit the credit institutions or insurance companies as well as associations of such enterprises from taking action, declare agreements and decisions within the meaning of Section 1 and 15 to be of no effect, as well as declare recommendations within the meaning of Section 38 (1) No. 11 to be illegal which constitute an abuse of the market position obtained by the exemption from Sections 1, 15 and 38 (1) No. 11. The Decision of the cartel authority is made in agreement with the competent supervisory authority. The supervisory authority shall not withhold its agreement except for reasons of supervisory law.

(5) Subsections (1) to (4) shall also apply to the enterprises mentioned in Section 1 (2) of the Act on the Supervision of Private Insurance Companies.

(6) If, in the cases defined in subsection (3) or (4), agreement between the competent authorities cannot be reached, the directions of the Federal Minister for Economic Affairs shall replace the agreement of the competent authorities; the directions shall be made in agreement with the Federal Minister of Finance. If the cartel authority and the competent supervisory authority are Land authorities, and an agreement cannot be reached, the decision shall be made by the authority competent under the law of the Land concerned.

Section 102a

(1) Sections 1 and 15 shall not apply to the establishment of copyright associations which are subject to supervision under the Act on the Exploitation of Copyrights and Related Rights, or to agreements or decisions in restraint of competition made by such associations, if and insofar as such agreements or decisions refer to activities requiring permission under Section 1 of the Act on the Exploitation of Copyrights and

Related Rights and have been notified to the supervisory authority. The latter shall issue instructions concerning such notifications and shall forward the notifications to the Federal Cartel Office.

(2) If practices or agreements or decisions of copyright associations constitute an abuse of the market position obtained as a result of the exemption from Sections 1 and 15, the Federal Cartel Office may prohibit such practices and declare such agreements or decisions to be of no effect. Where the arbitration board under Section 14 of the Act on the Exploitation of Copyrights and Related Rights has finally determined the contents of a general agreement or of an agreement with a broadcasting enterprise, the powers of the Federal Cartel Office under this Act may only be exercised, insofar as such agreement contains provisions prejudicing third parties or is operated abusively. Where the court of appeal under Section 15 of the Act on the Exploitation of Copyrights and Related Rights has determined the contents of an agreement, the powers of the Federal Cartel Office under this Act may only be exercised if such agreement is operated abusively.

(3) Decisions under this Act concerning the activities of copyright associations shall be made by the Federal Cartel Office in agreement with the supervisory authority.

Section 103

(1) Sections 1, 15, and 18 shall not apply:

1. to agreements between public utilities supplying electricity, gas, or water and other utilities or territorial authorities, insofar as one of the parties thereby agrees to refrain, in a certain territory, from supplying the public with electricity, gas, or water through fixed mains;

2. to agreements between utilities and territorial authorities, insofar as the authority thereby grants a utility the exclusive right of installation and operation of mains upon or underneath public roads for the current or intended direct public supply to final consumers of electricity, gas, or water in the territory of the authority;

3. to agreements between utilities and utilities at the distribution level, insofar as a utility at the distribution level thereby agrees to supply its customers with electricity, gas or water through fixed mains at prices and conditions not less favourable than those which the supplying public utility grants its comparable customers;

4. to agreements between utilities and other utilities, insofar as they are concluded for the common purpose of placing at the exclusive disposal of one or several utilities certain utility services through fixed mains in order to provide public supply.

(2) Insofar as agreements of the nature described in subsection (1) Nos. 1 and 2 exclude from public supply any kind of energy, or water, they shall be null and void. Subsection (1) shall not apply to them.

(3) Section 9 (2) sentence 1 and (3), (5) and (6) shall apply, as appropriate, to agreements of the nature described in subsection (1) Nos 1, 2 and 4 of this section. The agreements shall not be entered in the Cartel Register.

(4) Decisions under this Act which concern the public supply of electricity, gas or water through fixed mains shall be issued by the cartel authority in consultation with the competent supervisory authority.

(5) In the cases defined in subsection (1) the cartel authority may take the measures described in subsection (6), having regard to the purpose and meaning of the exemption, in particular the objective of as safe and cheap supply as possible,

1. insofar as the agreements or the manner of their implementation constitute an abuse of the market position obtained as a result of the exemption from the provisions of this Act, or
2. insofar as they violate the principles concerning trade in goods of commercial services accepted by the Federal Republic of Germany in international treaties.

An abuse within the meaning of sentence 1 No. 1 shall be present in particular, where

1. the market behaviour of a public utility runs counter to the principles determining the market behaviour of enterprises in conditions of effective competition, or
2. a public utility charges or demands perceptibly less favourable prices or business terms than similar public utilities, unless the public utility proves that the deviation is due to circumstances not attributable to it, or
3. a public utility unfairly hinders another public utility or any other enterprise in the use of energy generated at its own plants, or
4. a public utility unfairly hinders another public utility or another enterprise in the sale or purchase of electricity or gas (energy) by refusing to conclude with such enterprises agreements on the feeding of energy into, and the connected drawing of energy from, its supply network (transmission) on reasonable conditions.

In assessing whether the refusal is unfair, the effects of such transmission on market conditions, in particular on the supply conditions for the customers of the public utility obliged to transmit the energy, shall be taken into account. Refusal of transmission shall not, as a rule, be unfair if the transmission would result in a third party within the territory of the public utility being supplied with energy.

(6) The cartel authority may

1. direct the participating enterprises to discontinue the abuse objected to,
2. direct the participating enterprises to amend the agreements or decisions, or
3. declare the agreements and decisions to be of no effect.

(7) Subsection (5) shall apply to abuse proceedings against public utilities under Section 22 (5), as appropriate.

Section 103a

(1) The exemption under Section 103 (1) Nos. 1, 2 and 4 of agreements for the supply of electricity or gas shall only have effect on condition that the term of the agreement does not exceed twenty years. Where an extension of the agreement is agreed upon or a new agreement concluded between the same parties, a new notification (notification of extension) shall be required; Section 9 (2), (3), (5) and (6) shall apply, as appropriate.

(2) If in the case of a notification of the extension of an agreement as defined in Section 103 (1) No. 1 or 4 there is sufficient reason to assume that as a result of the agreement other enterprises will be unfairly hindered in the sale or the purchase of energy or that the agreement will lead to perceptibly less favourable supply conditions than are offered by similar public utilities, the cartel authority shall inform the contracting parties within three months from the date of notification that it has entered into an examination of the agreement. In this case the cartel authority shall

1. publish the notification in the Federal Gazette; and

2. give the parties involved as well as the competent supervisory authority an opportunity to present their views.

It may call an oral hearing. If no notice is given under sentence 1 or if, in case such a notice has been given, the cartel authority does not make a decision under subsection (3) within a further three-month period, the exemption shall be effective for another twenty years. The cartel authority may also render a decision under subsection (3) after the expiration of the three-month period if the contracting parties have agreed to an extension of the period. The powers of the cartel authority under Section 103(5) to (7) shall remain unaffected.

(3) In the case of a notification of an extension the cartel authority may declare an agreement as defined in Section 103 (1) No. 1 or 4 to be of no effect either wholly or in part, if as a result of the agreement supply at perceptibly more favourable conditions is prevented in one of the contract territories or in part of it, unless

1. there is a factually justified reason;

or

2. ineffectiveness of the agreement would perceptibly deteriorate market conditions, in particular the supply conditions for customers not covered by the alteration, or endanger the necessary security of supply.

(4) As regards agreements on the supply of electricity or gas which were notified prior to the coming into force of this Act (old agreements), exemption under Section 103 (1) Nos. 1, 2 and 4 shall end at the date fixed by the contracting parties on 1 January 1979 as the date of expiry of the agreement but not later than 1 January 1995. If on 1 January 1995 less than twenty years have lapsed since the notification of the old agreement, the exemption shall be extended to the date of the agreed expiration of the agreement but not beyond the expiration of twenty years from the date of notification. If in the case of an old agreement the same parties agree on an extension of the agreement or conclude a new agreement, subsection (1) sentence 2 and subsections (2) and (3) shall apply.

Section 104

(1) In the cases defined in Sections 99(2), and Section 100 the cartel authority shall take the measures described in subsection (2);

1. insofar as the agreements, decisions, or recommendations or the manner of their implementation constitute an abuse of the market position obtained as a result of exemption from the provisions of this Act, or

2. insofar as they violate the principles concerning trade in goods and commercial services accepted by the Federal Republic of Germany in international treaties.

(2) If the conditions set forth in subsection (1) are met, the cartel authority may:

1. direct the participating enterprises to discontinue the abuse objected to,
2. direct the participating enterprises to amend the agreements or decisions, or
3. declare the greements and decisions of no effect.

Section 104a

The provisions of the Energy Industry Act of 13 December, 1935 (Legal Gazette of the Reich I, p. 1451), last amended by the Foreign Trade and Payments Act of 28 April, 1961 (Lega Gazette I, p. 481) including the relevant implementing regulations shall not precude application of Sections 22 and 26 (2).

Section 105

In cases under Sctions 99 (2), 100, 102, 102a, and 103, the provisions of Sections 13, 14, and 14 shall apply as appropriate.

Part VI

TRANSITIONAL AND FINAL PROVISIONS

Section 106

(1) Agreements of the nature described in Section 15 which were validly concluded prior to the coming into force of this Act shall cease to have effect after the expiration of six months from such coming into force insofar as they are incompatible with Section 15.

(2) Agreements and decisions of the nature described in Sections 1 to 5 (3), 6 to 8, 20 (1), 21, 99 (2) Nos. 2 to 4, 102 and 103 (1) Nos. 1, 2, and 4, which were validly concluded prior to the coming into force of this Act, shall cease to have effect after the expiration of six months from such coming into force, unless by that time:

1. in the casesdefined in Sections 2, 3, 5 (1), 6 (1), and 103 (1), Nos. 1, 2 and 4, the agreements and decisions have been notified to the cartel authority; Sections 9 (2), sentence 3, (3) to (7), and 10 shall apply as appropriate;
2. in the casesdefined in Sections 4, 5 (2) and (3), 6 (2), 7, 8, 20 (1), and 21, an application for authorisation has been filed with the cartel authority;
3. in the casesdefined in Section 99 (2) Nos. 2 to 4, the agreements and decisions have been notified to the cartel authority; Section 99 (3) shall apply as appropriate;
4. in the casesdefined by Section 102 (1), sentence 2, also in conjunction with subsection (3), the agreements and decisions have been reported to the competent supervisory authority.

(3) Agreements and decisions of the nature described in Sections 5 (4) and 100 which were validly concluded prior to the coming into force of this Act shall be reported immediately to the cartel authority: Sections 9 (2), sentence 3, (3) to (7), and 10 shall apply, as appropriate, to agreements and decisions of the nature described in Section 5 (4).

(4) Any arbitration agreement validly concluded prior to the coming into force of this Act and pertaining to future legal disputes arising out of agreements and decisions of the nature described in Section 1 shall be null and void pursuant to Section 91, unless prior thereto the parties have joined issue on the merits in arbitration proceedings.

Section 107

This Act shall also extend to the Land Berlin pursuant to Section 13 (1) of the Third Transference Act of 4 January, 1952, (Legal Gazette I, p. 1). Ordinances issued under this Act shall extend to the Land Berlin pursuant to Section 14 of the Third Transference Act.

Section 108

(Without effect).

Section 109

(1) This Act shall come into force on 1 January 1958.*

(2) With effect from the same date the following provisions of law are hereby repealed:

1. the Ordinance against the Abuse of Economic Power of 2 November 1923 (RGBl**I, pp. 1067, 1090 as officially re-enacted in the Ordinance concerning Measures in the Fields of Administration of Justice and Administration of 14 June 1932, Title I, Chapter VI (RGBl. I, pp. 285, 289), and by the Act Amending the Cartel Ordinance of 15 July 1933 (RGBl. I, p. 487) and by the Ordinance of 5 September 1934 (RGBl. I, p. 823);

2. the Ordinance for the Removal of Financial, Economic and Social Emergencies of 26 July 1930, Title 5 - Prevention of Uneconomic Resale Price Maintenance - (RGBl. I, pp. 311, 328);

3. the Implementing Order concerning the Abolition and Prohibition of Resale Price Maintenance of 30 August 1930 (Deutscher Reichsanzeiger und Preussischer Staatsanzeiger No. 205);

4. the Ordinance concerning Resale Price Maintenance for Branded Articles of 16 January 1931 (RGBl. I, p. 12);

* This provision deals with the coming into force of the original text as enacted on 27 July 1957, (Legal Gazette I, p. 1081). The coming into force of the modifications brought about by the Acts Amending the Act against Restraints of Competition of 15 September 1965 (Legal Gazette I, p. 1363) and of 3 August, 1973 is governed by Articles 6 and 4, respectively, of the Amending Acts.

** Legal Gazette of the Reich.

5. the Fourth Ordinance for the Protection of Economy and Finance and the Preservation of Peace of 8 December 1931, Title I, Chapters I and II (RGBl. I, p. 699);

6. the Act on the Establishment of Compulsory Cartels of 15 July 1933 (RGBl. I, p. 488), and the Implementing Order of 6 October 1933 (RGBl. I, p. 724);

7. the Act on Arbitration Clauses in Cartel Agreements of 18 December 1933 (RGBl. I, p. 1081);

8. the Ordinance concerning Bidding Cartels of 9 May 1934 (RGBl. I, p. 376);

9. the Ordinance of 29 March 1935, supplementing the Ordinance concerning Resale Price Maintenance and against the Increase in Prices of Essential Supplies (RGBl. I, p. 488);

10. the Ordinance concerning Co-operative Enterprises in Trade and Industry of 4 September 1939 (RGBl. I, p. 1621);

11. the Ordinance concerning Resale Price Maintenance of 23 November 1940 (RGBl. I, p. 1573);

12. the Implementing Order concerning Market Supervision in Trade and Industry and Concerning Simplification of Organisation in the Field of Market Regulation of 20 October 1942 (RGBl. I, p. 619);

13. the Order of 27 December 1948 - PR 130/48 - concerning Consumer Prices (Mitteilungsblatt der Verwaltung für Wirtschaft, Vol. II, p. 196);

14. Act No. 56 of the US Military Government of 28 January 1947 (Military Government (MG) Gazette, Germany, US Area of Control, Issue C, p. 2);

15. Ordinance No. 78 of the British Military Government (MG Gazette Germany, UK Area of Control, p. 412);

16. Ordinance No. 96 of the French High Command in Germany of 9 June 1947 (Official Gazette of the French High Command in Germany, p. 784);

17. Implementing Regulation No. 1 under Act No. 56 of the US Military Government (MG Gazette Germany, US Area of Control, Issue C, p. 6) as amended by Amendments No. 1 (MG Gazette Germany, US Area of Control, Issue D, p. 5), No. 2 (MG Gazette Germany, US Area of Control, Issue I, p. 17), No. 3 (MG Gazette Germany, US Area of Control, Issue O, p. 28), and No. 4 (Official Gazette of the Allied High Commission for Germany, p. 2882);

18. Implementing Regulation No. 1 under Ordinance No. 78 of the British Military Government (MG Gazette Germany, UK Area of Control, p. 416) as amended by the Amendment to Implementing Regulation No. 1 (MG Gazette Germany, UK Area of Control, p. 542) and the Second Amendment to Implementing Regulation No. 1 (MG Gazette Germany, UK Area of Control, p. 738);

19. Order No. 37 of the French High Command in Germany of 9 June 1947 (Official Gazette of the French High Command in Germany, No. 78, p. 785);

20. Implementing Regulation No. 2 under Act No. 56 of the US Military Government of 10 April 1957 (Legal Gazette, I, p. 376);

21. Implementing Regulation No. 2 under Ordinance No. 78 of the British Military Government of 10 April 1957 (Legal Gazette, I, p. 377);

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22. Implementing Regulation No. 2 under Ordinance No. 96 of the French High Command in Germany of 10 April 1957 (Legal Gazette, I, p. 377);

23. Decision No. 4 of the Allied High Commission of 26 January 1950 (Official Gazette of the Allied High Commission in Germany, p. 87) as amended by Section 1 of Decision No. 36 of the Allied High Commission of 4 May 1955 (Official Gazette of the Allied High Commission for Germany, p. 3248).

Sections 2 to 4 of the Fourth Act to amend the Act against Restraints of Competition

Article 2

The Federal Minister for Economic Affairs may publish the wording of the ARC as amended by the present Act as of its enactment in the Legal Gazette of the Federal Republic of Germany.

Article 3

This Act shall also extend to the Land Berlin pursuant to Section 13 (1) of the Third Transference Act.

Article 4

(1) This Act shall come into force on the day following its promulgation. Article 1 Nos. 3 to 6 shall come into force effective 28 February 1980.

(2) Retroactive application in conjunction with Sections 38 and 39 of the ARC shall be ruled out.

Annex II

FINLAND : ACT ON RESTRICTIVE BUSINESS PRACTICES (709/1988)

[Unofficial translation]
[Ministry of Trade and Industry]
[20 April 1989]

Made in Helsinki on 29 July 1988

Chapter 1
General provisions

§ 1 This Act shall safeguard sound and effective economic competition by protecting it from detrimental restrictive practices.

In applying the Act, special account shall be taken of the interest of consumers and the need of protecting the freedom to do business against unfounded barriers and restraints.

§ 2 This Act shall not apply to agreements or arrangements concerning the labour market or the production of primary products referred to in the laws on agricultural income.

Unless otherwise provided by the Council of State, this Act is not applicable to a restrictive practice restraining economic competition outside Finland insofar as they are not aimed at Finnish customers. The Council of State may, however, provide that the Act shall also extend to a restrictive practice concerning one or more foreign countries if a treaty concluded with another state so requires or if it lies in the interests of Finland's foreign trade to make such provision.

§ 3 For the purposes of this Act, an "entrepreneur" is any physical person or private or public entity professionally engaged in offering for sale, purchasing, selling or otherwise acquiring or disposing of goods or services (i.e. "commodities") against a consideration.

A dominant market position is held by an entrepreneur or a group of entrepreneurs that has, for the whole of the country or some part(s) of it, any such sole right or other dominant position on a given commodity market which significantly directs the price level or terms of delivery for that commodity or has a similar effect on the conditions of competition at a given level of production or distribution.

Chapter 2
On restrictive practices

§ 4 It is not allowed within business to require of the next level of sale that it shall abstain, in selling or leasing a commodity tendered in the territory, from undercutting a set price, remuneration or rate of these.

What was said in the first paragraph of this § 4 shall not prevent from stating a suggested price, remuneration or rate of these.

§ 5 It is not allowed within business to apply any such agreement or other collusive arrangement according to which, in competing for the sale or purchase of a commodity or for the rendering of a service,

1) one party shall give up tendering

2) one party shall tender higher or lower than another; or

3) the tendered price, advance or credit term is otherwise based on mutual collusion among the tenderers.

What was said in the first paragraph (with sub-paragraphs) of this § 5 shall not apply to any agreement or other arrangement implying tenderers' mutual collusion to submit a joint tender on joint action.

§ 6 Null and void shall be any such term of an agreement concluded between entrepreneurs either needing or tendering one and the same commodity at the same level of production or distribution, or any such provision of the rules of a group of entrepreneurs and any such decision made by such a group, that stipulates a fine to be paid for non-fulfilment of the agreement or forfeiture to take place in respect of a security with a view to the setting of prices, remunerations or rates of these, or with a view to the specifying of the delivery terms, the amounts of delivery or the delivery area for that commodity. No damages or other penalties shall be incurred as a result of a failure to comply with any such obligation.

Unfair legal transactions restraining competition fall under §§ 36 and 38 of the Act on Legal Transactions under Law of Property.

§ 7 A restrictive practice shall be deemed to have detrimental effects if it, in a manner deemed unacceptable from the point of view of sound and effective economic competition,

1) affects price formation;

2) decreases or may decrease efficiency within business;

3) obstructs or handicaps the pursuit of another trade;

4) leads to abuse of a dominant market position; or

5) is incompatible with an international treaty binding Finland.

Abuse of a dominant market position is deemed to be involved e.g. if a business relationship is abstained from without valid cause, if any such terms of a business relationship are used that are not based on good merchantship and which restrain the customer's latitude of action, if an unfair pricing practice or one obviously intended to restrain competition is applied, or if the dominant market position is made use of in order to restrain competition in the production or marketing of other commodities.

Chapter 3
Notification of restrictives practices

§ 8 Any agreement, decision or other arrangement involving an obligation to restrict or limit business activity or to apply stipulated prices or rates of prices shall be notified, in writing and in the way stated below, to the Office of Free Competition within 30 days from the day on which they were made. The same applies to amendments of any such arrangement.

The notification obligation referred to in the first paragraph of this § 8 shall not apply when the intended duration of the agreement, decision or other arrangement or any amendment of these is obviously brief or when the market share of the firms parties to the arrangement or amendment is negligible in regard of the commodity concerned.

Notification shall be made by any entrepreneur party to an agreement, a decision or another arrangement referred to in the first paragraph of this § 8. On behalf of a group of entrepreneurs the notification is made by the group's board of directors or, if no such board exists, the person in charge of the enforcement of the decisions taken by the group.

The Office of Free Competition may grant exemption from the notification obligation to one or several of those obliged if special reasons for such an exemption are deemed to exist.

§ 9 An entrepreneur or a group of entrepreneurs shall, if invited to do so by the Office of Free Competition, notify to the Office in writing even other restrictive practices besides those referred to in § 8.

An entrepreneur or a group of entrepreneurs is also required to notify to the Office of Free Competition in writing, upon the latter's invitation, whether or not he or it has a dominant market position.

Amendments made to any restrictive practices referred to in the first and second paragraph of this § 9 shall be notified by the entrepreneur or group of entrepreneurs to the Office of Free Competition upon its invitation. The notification shall be in writing and be accompanied by evidence needed.

§ 10 An entrepreneur or a group of entrepreneurs who either is party to an agreement, decision or amendment referred to in § 8 or the first paragraph of § 9 or has a dominant market position referred to in the second paragraph of § 9 shall, upon invitation by the the Office of Free Competitions, provide the Office with any information and documents that this may need in examining the content, purpose and effect of the restrictive practice.

§ 11 The Office of Free Competition may require an entrepreneur with a dominant market position to notify any such agreements relating to the acquisition of a firm, the purchase of majority shareholding or any other acquisition of dominance regarding the entrepreneur's activities as may be assumed to affect the competitive conditions significantly.

The Office of Free Competition may require an entrepreneur referred to in the first paragraph of this § 11 to furnish any necessary additional evidence on the measure that the notification relates to.

Chapter 4
Removal of the detrimental effects of restrictive practices

§ 12 Restrictive practices and their effects shall be investigated by the Office of Free Competition. In respect of a restrictive practice investigated, it may draw up a report subsequently filed in the public register it maintains. The Office of Free Competition may pronounce the material accrued in the course of the investigation public to the extent that it does not contain secrets relating to business or profession.

If the Office of Free Competition deems a restrictive practice to have detrimental effects referred to in § 7, it must take measures needed to remove those effects.

Should the Office of Free Competition not have succeeded in removing the detrimental effects of a restrictive practice through negotiations or by some other means, it must make a proposal for the consideration of the matter within the Competition Council.

§ 13 To remove the detrimental effects of a restrictive practice, the Competition Council may take up the matter for consideration.

Failing a proposal referred to in the third paragraph of § 12 by the Office of Free Competition for the consideration of a restrictive practice within the Competition Council, the proposal may be made by an entrepreneur whom the practice directly affects or by the association or other organisation watching over the interests of entrepreneurs or consumers. The Office of Free Competition shall be provided an opportunity to comment on the proposal.

§ 14 In the case of a restrictive practice mainly concerning banking, deliberation of the issue by the Competition Council shall be proposed by the Bank Inspectorate. In the case of a restrictive practice mainly concerning insurance, the corresponding proposal shall be made by the Ministry of Social Affairs and Health. The Office of Free Competition shall be provided an opportunity to comment on the proposal.

Failing a proposal referred to in the first paragraph of this § 14, the Office of Free Competition may propose deliberation of a restrictive practice referred to in the first paragraph of this § 14 within the Competition Council. The Bank Inspectorate or the Ministry of Social Affairs and Health shall, respectively, be provided an opportunity to comment on the proposal.

§ 15 Upon receipt by the Competition Council of a proposal envisaged in §§ 12 - 14, the chairman of the Council shall consider it preliminarily unless he or she decides to suggest to the Council that the proposal should be left uninvestigated or be directly discarded as unfounded.

After the preliminary consideration, the Competition Council shall investigate whether the restrictive practice has any detrimental effects under § 7. The Competition Council shall undertake negotiations with those involved for the removal of the detrimental effects.

§ 16 Should the detrimental effects of a restrictive practice not be removed through negotiation, the Competition Council may

1) prohibit the entrepreneur or the group of entrepreneurs from applying an agreement or any other restrictive arrangement or similar practice;

2) obligate the entrepreneur to supply the commodity concerned to another entrepreneur on terms corresponding to those the entrepreneur applies in offering the commodities to entrepreneurs in corresponding position; or

3) order, for a period of maximum six months at a time, that an entrepreneur or a group of entrepreneurs in a dominant market position shall not exceed or undercut the price, remuneration or rate of these as set by the Competition Council, if the price etc. has become excessively high or, because of its low level, such that it essentially distorts the conditions of competition.

Despite an appeal, a decision made by the Competition Council shall be complied with unless the Supreme Court of Administration determine otherwise.

§ 17 In issuing a prohibition, an obligation or an order under the first paragraph (with subparagraphs) of § 16, the Competition Council may reinforce the effect of the measure by imposition of a conditional fine.

Prohibitions and obligations referred to in subparagraphs 1 and 2 of the first paragraph of § 16 may be imposed even temporarily for the time the deliberation of the issue by the Competition Council takes. What was said in the first paragraph of this § 17 is, mutatis mutandis, applicable to such cases.

A conditional fine becomes payable by order of the Competition Council.

No term or condition included in an agreement, rule, decision or any other judicial measure or arrangement shall be applied or enforced if it is contrary to § 4 or 5 or a ban, obligation or requirement issued by the Competition Council.

Chapter 5
Miscellaneous provisions

§ 18 The Council for Competition may, upon a received application, prescribe that the provisions of §§ 4 - 6 shall not be applied with regard to a restrictive practice. The Office of Free Competition shall be consulted in respect of applications received.

An exemption referred to in the first paragraph of this § 18 may be granted if the restrictive practice is considered to involve such savings in expenditure that mainly benefit consumers or customers, or otherwise to advance an arrangement acceptable from an overall point of view. The Council for Competition may decide upon the terms of the exemption.

Upon a proposal by the Office of Free Competition, the Competition Council may withdraw an exemption if any of its terms or conditions have not been abided by or any of the circumstances prevailing at the time when the exemption was made has changed essentially. Regarding a withdrawal, the licensee shall be heard.

Should the application regarding a restrictive practice referred to in the first paragraph of § 6 come up for consideration within the Competition Council before the case in dispute concerning the agreement, order or decision to which it relates has been left for decision at a court of first instance, that court shall not make verdict on the matter until the Competition Council has made its decision by reason of the application.

§ 19 An official named by the Competition Council shall have the right to perform an inspection needed to ensure that the requirements in and under this Act have been complied with. The same shall apply to the corresponding official of a provincial government with regard to the performing of an inspection entrusted to him or her by the Competition Council.

An entrepreneur and a group of entrepreneurs shall, when requested to do so, produce to an official referred to in the preceding first paragraph of this § 19 any commercial correspondence, books and other documents that may have significance in ensuring that the requirements in and under this Act have been complied with.

Where needed, the Police shall lend assistance in the performing of inspections referred to in the first paragraph of this § 19.

§ 20 Appeal against a decision made by the Competition Council under the first paragraph of § 16, a decision to impose a conditional fine under the first paragraph of § 17, a decision to make an imposed conditional fine payable under the third paragraph of § 17, or a decision to leave a proposal submitted to the Competition Council uninvestigated or to discard it, can be filed with the Supreme Court of Administration in accordance with what is provided in the Act on Appeal against Administrative Issues (154/1950).

No appeal through a separate complaint shall, however, exist in respect of a decision whereby the Competition Council decided, by virtue of the first paragraph of § 17, to impose a conditional fine, nor shall there be any kind of appeal for any decision made by the Competition Council under this Act that is not one of those mentioned in the first paragraph of this § 20.

Appeal against a decision made by the Competition Council under the first paragraph of § 12 or a decision by the Council to discard an application under the fourth paragraph of § 8 lies with the Supreme Court of Administration in accordance with what is provided in the Act on Appeal against Administrative Issues. Otherwise there is no appeal through complaint against decisions made by the Competition Council under this Act.

§ 21 The obligations to make notifications and to disclose facts under §§ 8 - 11 or to produce documents under the second paragraph of § 19 do not extend to any professional secrets of technical nature.

§ 22 Whoever in the exercise of a function under this Act has received knowledge of any secret relating to a profession or trade shall not make himself guilty of unauthorized disclosure of it, unless this be officially rendered public in due course or unless the person or entity whom the secrecy is to benefit expressly consent to such disclosure.

§ 23 The Competition Council may impose a conditional fine for the reinforcement of the obligation to disclose facts and produce documents under § 10 and the obligation to make notifications and disclose facts under § 11 to provide for the case that the obligation is not met within the specified period.

A conditional fine becomes payable by order of the Provincial Government of the province where the payer's place of domicile is situated.

§ 24 Whoever wilfully fails to comply with a provision of § 4 or § 5 shall be sentenced, on account of a major offence involving a restrictive practice, to the payment of a fine or to imprisonment for not more than one year.

Whoever fails to observe the obligation to make notifications or disclose facts under § 8 or § 9 or to produce documents under the second paragraph of § 19, or whoever wilfully provides, whether in these respects or otherwise, the Office of Free Competition or the Competition Council a false notification or other untrue piece of information shall be sentenced, on account of a minor offence involving a restrictive practice, to the payment of a fine or to imprisonment for not more than six months, unless a more severe penalty be imposed for such an act or omission elsewhere in law.

Regarding the declaring of any profit obtained through a major offence forfeit to the State shall apply what is provided in § 16 of Chapter 2 of the Penal Code.

§ 25 Whoever wilfully disregards a prohibition formulated in § 22 shall be sentenced, on account of non-compliance with a secrecy provided for in the Act on Restricitve Business Practices, to the payment of a fine or to imprisonment for not more than six months.

The Public Prosecutor is not allowed to institute proceedings for an offence envisaged in the preceding first paragraph of this § 25 unless the complainant has brought legal action.

§ 26 In dealing with an offence involving a restrictive practice, the lawcourt shall provide the Office of Free Competition an opportunity to be heard.

The limitation of bringing legal action against non-fulfilment of the obligation to make notifications under § 8 shall run from the date on which the agreement, decision or another arrangement referred to in the first paragraph of § 8 ceases to apply.

§ 27 More detailed regulations on the implementation of this Act shall be made by decree according as necessary.

§ 28 This Act enters into force on 1 October 1988.

This Act repeals the Act of 25 May 1973 on the Promotion of Economic Competition (423/1973) as subsequently amended.

Any decisions made under the Act of 18 January 1957 on the Supervision of Restrictive Practices Affecting the Economy (47/1957), the Act of 3 january 1964 on the promotion of Economic Competition (1/1964) or the Act of 25 May 1973 on the Promotion of Economic Competition shall remain in force until amended or repealed.

(Signatures)

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16 February 1990

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TRADE AND DEVELOPMENT BOARD
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on Restrictive Business Practices
Eighth session
Geneva, 23 October 1989

COMMUNICATION DATED 6 FEBRUARY 1990 FROM THE REPRESENTATIVE OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND ADDRESSED TO THE CHAIRMAN OF THE INTERGOVERNMENTAL GROUP OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES AT ITS EIGHTH SESSION

The attached communication addressed to the Chairman of the Intergovernmental Group of Experts on Restrictive Business Practices at its eighth session is being circulated to members of UNCTAD at the request of the representative of the United Kingdom of Great Britain and Northern Ireland.

GE.90-50348/5355A

Intergovernmental Group of Experts on Restrictive Business Practices, eighth session, 23-27 October 1989

6 February 1990

Dear Mr Ortuzar,

With reference to the letter of the delegation of the Union of Soviet Socialist Republics of 2 March 1989, circulated as document TD/B/RBP/54 and to the letter of 23 October 1989, circulated as document TB/B/RBP/64, I should like to state the following on behalf of the delegations of the United States of America, the united Kingdom and France.

The establishment of the Federal Cartel Office in the Western Sectors of Berlin was approved by the French, American and British authorities acting on the basis of their supreme authority. The Federal Cartel Office exercises its functions under a law which was adopted in Berlin in accordance with established procedures. The activities of the Federal Cartel Office in the Western Sectors of Berlin do not constitute constitutional or official acts of a state body of the Federal Republic of Germany which contradict the provisions of paragraph 1 of annex II of the Quadripartite Agreement of 3 September 1971. Neither the location nor the activities of the office in the Western Sectors of Berlin, therefore, contravene any of the provisions of the Quadripartite Agreement.

With regard to the inclusion of Mr. Wangemann in the delegation of the Federal Republic of Germany, annex IV of the Quadripartite Agreement stipulates that, provided matters of security and status are not affected, the Federal Republic of Germany may represent the interests of the Western Sectors of Berlin in international organizations and international conferences and that permanent residents of the Western Sectors of Berlin may participate jointly with participants from the Federal Republic of Germany in international exchanges. It is in any case for the Federal Republic of Germany alone to decide on the composition of its delegation.

Furthermore, the statement from the Soviet delegation contains an incomplete and consequently misleading reference to the Quadripartite Agreement. The relevant passage of that Agreement to which the Soviet statement refers provides that the ties between the Western Sectors of Berlin and the Federal Republic of Germany will be maintained and developed, taking into account that these sectors continue not to be a constituent part of the Federal Republic of Germany and not to be governed by it.

Regarding other communications on the subject, the Three Powers would add that states which are not parties to the Quadripartite Agreement are not competent to comment authoritatively on its provisions.

We request that you circulate this text as an official document.

Yours sincerely,

(Signed) Mr. D.O. Hay-Edie
First Secretary,
Permanent Mission of
the United Kingdom

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PREPARATIONS FOR THE UNITED NATIONS CONFERENCE TO REVIEW ALL ASPECTS OF THE SET OF THE MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

Proposals for the improvement of the Set of Principles and Rules

Note by the UNCTAD secretariat

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GE.90-50980

INTRODUCTION

1. The Intergovernmental Group of Experts on Restrictive Business Practices, at its eighth session, in its agreed decisions and conclusions, recognized the importance of an adequate preparation for the United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the Review Conference) in November 1990, and requested the UNCTAD secretariat, in order to assist the Intergovernmental Group of Experts on Restrictive Business Practices, at its ninth session, due to be held 23-27 April 1990, in preparing for the review of all aspects of the Set, including making proposals for the Conference, to prepare necessary documentation.

2. Accordingly, in its "Comprehensive review of the implementation of the Set", document TD/B/RBP/69, the UNCTAD secretariat has made a broad assessment of the application and implementation of the Set in the ten years since its adoption, with a view to bringing forward proposals for improvements or further development of the Set, where appropriate. Special emphasis has been given to issues relating to transparency and consultation procedures, in the light of the views expressed at the seventh and eighth sessions of the IGE.1/

3. The Secretary-General of UNCTAD, in his note of 11 January 1990, invited States members of UNCTAD, and regional groupings to the extent that they have comeptence in the area of restrictive business practices, to inform the secretariat, if they have not already done so, of any proposals they might wish to make for the improvement or further development of the Set.

4. This note reproduces replies received from States to date. Replies received subsequently will be reproduced as addendum.

1/ See, in particular, the views presented by the Group of 77 at the seventh session of the IGE, which are reproduced in paragraphs 28-32 of that session's report (document TD/B/RBP/56-TD/B/1210).

I. REPLIES RECEIVED FROM STATES

1. The Netherlands (on behalf of States members of Group B)

5. The Government of the Netherlands stated that countries members of Group B, after careful consideration, had come to the conclusion that the Set as a whole represented a satisfactory statement of sound competition principles and rules. For that reason, the members of Group B were of the opinion that the Set, as it stands now, did not need any textual changes. The members of Group B therefore would not submit proposals to that effect.

6. With respect to multilateral consultations and exchanges, the members of Group B fully endorsed the statements in the agreed decisions and conclusions of the eighth session of the Intergovernmental Group of Experts, and of earlier sessions, regarding the usefulness of multilateral information consultations. Accordingly, and in order to more fully implement the Set, the members of Group B suggested that the IGE at its ninth session should recommend to the Conference, that the Conference should recognize the utility of such multilateral information consultations and that the IGE should recommend in particular that :

(a) The IGE at its future sessions should provide improved mechanisms for informal discussions and exchanges of views among experts, pursuant to sections C.4 and G.3 (a) of the Set;

(b) In particular, every session of the IGE should provide for at least two such meetings, each devoted to a subject of practical importance to restrictive business practices experts, each meeting consisting of short volunteered presentations by several delegations, followed by comments, questions and further exchanges of views, the subjects to be chosen well in advance of the meeting; and,

(c) The subjects for these informal consultations at the tenth session of the Group should be selected by the Conference in discussions among all Groups.

2. Sri Lanka

7. The Government of Sri Lanka suggested that the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (TD/B/RBP/CONF/10/Rev.1) be amended as follows :

Section A - Objectives

Amendment: In paragraph (2), add a new item (d) "Stimulation of investment and economic growth".

Reasons: In many developing countries, such as Sri Lanka, what is needed is investment which, in turn, leads to economic development. Sub-paragraphs (a), (b) and (c) do not convey this idea. Competition laws, if properly administered, can stimulate investment (both local and foreign) and hence economic growth.

Section C - Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices

Amendment: In paragraph (7), add the following item:

(c) "Providing greater employment and income opportunities for their under-utilized and unutilized work force."

Reasons: One of the urgent needs of developing countries is the provision of employment opportunities for their work force. It is vital that this aspect should be taken account of by agencies charged with the control of restrictive business practices.

Section E - Principles and rules for States at national, regional and subregional levels

Amendment: Paragraph (6) to read as follows:

"States should institute or improve procedures for obtaining information from enterprises necessary for their effective control of restrictive business practices, including restrictive agreements. In this respect States in which transnational corporations are located are urged to co-operate with other States requiring details of restrictive business practices, in respect of such corporations when they also operate in the latter States".

Reasons: It is not practicable for developing countries, specially the smaller ones, to obtain this information from transnational corporations active within their territories. It is vital that the countries in which the headquarters of these transnational corporations are located should assist restrictive business practices agencies in developing countries, such as Sri Lanka, to obtain this information.

Section G - International institutional machinery

Section (ii) Functions of the Intergovernmental Group

Amendments Add the following new item (c) in place of the present (c), which should now become (d).

"To commission studies and research from qualified and competent consultants relevant to the Set of Principles and Rules."

Reasons: items (b) and (c) refer to the dissemination of studies and research by UNCTAD and other United Nations bodies. There is, however, a need for UNCTAD to be able to commission studies by various experts in these fields (e.g. lawyers or economists), and to disseminate the results of their research. This is the only way in which the whole system of control of restrictive business practices can be improved, particularly in developing countries which have little experience in this highly specialized activity.

3. German Democratic Republic

8. The Government of the German Democratic Republic stated that it held the view that the wording of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices should not be amended. The German Democratic Republic, however, deemed it advisable to embody therein supplementary regulations regarding transparency and consultation procedures. The German Democratic Republic, furthermore, advocated that the forms of restrictive business practices which had emerged since the adoption of the Set, should be identified and the position of the States members of UNCTAD be defined accordingly.

4. Norway

9. The Government of Norway stated that the Norwegian authorities agreed with the main principles expressed in the Set of Multilaterally Agreed Equitable Principles and Rules, and were of the opinion that there was no need for a general revision of the present code. New formulations would, in their view, have minimal beneficial effects, compared with an increased ability to apply the Set as it is.

10. The Norwegian Competition Authorities therefore suggested that Section F, 6, in the Set, relating to technical assistance, advisory and training programmes concerning restrictive business practices, should be stressed.

11. Over the last years they had gained much experience in this respect. They referred to the seminars that UNCTAD organized in Nairobi and in Bangkok, the OECD symposium with participation from both the developing countries and Eastern European countries, and the seminar that OECD arranged in Nairobi at the request of the Kenyan Competition Authorities, and other similar arrangements. They also now had experience with trainee programmes for representatives from developing countries to study and work for periods at the premises of the competition authorities in developed countries.

12. In their view, a further development along these lines would be much more beneficial for the developing countries than further refinements of the wordings of the Set.

13. The Government of Norway was prepared, however, to discuss any amendments to the Set which might be proposed from other Groups.

14. Finally, they referred to the proposals which were submitted by the Netherlands on behalf of Group B.

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PREPARATIONS FOR THE UNITED NATIONS CONFERENCE TO REVIEW ALL ASPECTS OF THE SET OF THE MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

Proposals for the improvement of the Set of Principles and Rules

Note by the UNCTAD secretariat

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GE.90-51522

A. ISLAMIC REPUBLIC OF IRAN

1. The Government of Islamic Republic of Iran submitted the following proposals on behalf of the States members of the Group of 77:

I. Proposed amendments to the Set (TD/RBP/CONF/10/Rev.1)

Section A - Objectives

Paragraph 2 - for attain greater efficiency in read help accelerate and promote

Sub-paragraph (c) should read

(c) Encouragement of innovation and efficiency

A new sub-paragraph (d) should read

(d) Stimulation of investment and economic growth.

Section B - Definitions and scope of application

Paragraph 1 - delete unduly.

Paragraph 9 - before intergovernmental agreements insert formal.

Section C - Multilaterally agreed equitable principles for the control of restrictive business practices

Paragraph 1, first line, should read

Appropriate action should be taken by Governments in a mutually reinforcing manner ....

Paragraph 2 - after Governments insert especially between Governments of developed and developing countries

Paragraph 7 - for In order to ensure the equitable application of the Set of Principles and Rules, States, particularly developed countries,

read For the equitable application of the Set of Principles and Rules, States, particularly developed countries, should ensure that their enterprises do not engage in restrictive business practices adversely affecting the trade and development of developing countries, and

Section D - Principles and rules for enterprises including transnational corporations

Paragraph 3 - delete

"except when dealing with each other in the context of an economic entity wherein they are under common control, including through ownership, or otherwise not able to act independently of each other,

Paragraph 3, sixth line, delete unduly.

Paragraph 4 - delete unduly.

Paragraph 4 - delete footnote.

Section E - Principles and rules for States

Paragraph 2 - delete unduly.

Paragraph 6 - after business practices insert adversely affecting international trade, particularly the trade and development of developing countries,

Section G - International measures

Paragraph 1 - should read

1. A Committee on Restrictive Business Practices operating within the framework of UNCTAD will provide the institutional machinery.

II. Proposals for improving transparency in the area of restrictive business practices

2. As a first measure towards ensuring transparency in the area of restrictive business practices, States which so far have not done so should establish a public registration system of all RBPs originating in their country which could adversely affect international trade, particularly the trade and development of developing countries. States, and in particular those developed countries which already collect such information on a discrete basis, should agree to open their registries to foreign trade partners wishing to deal with the domestic enterprises in question. As a second step, information concerning RBPs adversely affecting international trade should be notified to a centralized registry to be established in UNCTAD, open for consultation by any State upon request. Such a procedure would be of particular benefit to developing countries which could then be forewarned about the cost-benefit of, for example, a tender received from foreign export cartels. This notification procedure would be additional to other measures imparting transparency to the application of restrictive practices in international trade (as provided for in section E, paragraphs 7 and 9 of the Set), namely seeking and granting information on a bilateral and multilateral level by Governments upon request and/or voluntarily.

III. Proposals for improving and developing the consultation procedures in section F, para.4, of the Set

3. In the Final Act of UNCTAD VII, all Governments agreed that the consultation procedures on RBPs should be defined. The Intergovernmental Group of Experts, at its sixth session, also invited States to report on their experience with the procedures mentioned in the Set, with a view to assisting in making proposals for defining these procedures. But, so far, the consultation procedures as indicated in the Set have never been used successfully. One reason for the lack of success of the consultation procedures, as called for under the Set, could be the lack of knowledge, in many capitals, of the adverse effects of RBPs on a country's trade and development, pointing once again to the imperative need for technical assistance in developing countries.

4. Moreover, in developing countries having RBP control, such control might be focused on the internal marketing and distribution of goods and services, where there might be a lack of co-ordination with respect to external trade. Such co-ordination should be reinforced by the establishment of, for example, an inter-ministerial focal point on RBPs directly in contact with the Ministry of Foreign Trade as well as with other ministries and authorities having competence with enterprise and international trade transactions in both goods and services, and closely linked with the RBP control authority. Such a focal point would be essential in the detection of RBPs occurring with respect to imports, such as collusive tendering affecting import procurement, or to exports where such exports were hampered by practices originating from abroad. The task of the RBP focal point would be to detect such practices when they occur, with the help of enterprises and their respective chambers of commerce. Once an RBP had been detected, a communication procedure could be followed, leading to the presentation of the issue to the RBP control authority. In case of difficulty in the investigations, or information gathering, or the resolution of the case, the RBP focal point could then engage in consultations with the authorities of the State or States where such RBPs originated, with a view to finding a mutually acceptable solution.

5. In order to make such consultations more feasible and practically useful to all countries, and particularly to developing countries, it is essential that the elements of such consultations be defined more precisely. These should, in principle, include:

- Subjects of consultation;
- Objectives and principles of consultation;
- Consultation modalities;
- Logistical elements;
- Handling of the outcome of consultation.

6. Some important elements that would be incorporated into the defined consultation framework would be as follows:

- Consultations could be conducted not only when RBPs cases were disputed but also when there was difficulty in the investigation process;

- Special arrangements and mutual undertakings could be made in relation to possible greater access to relevant information, documents and data which might be of essential importance for conducting constructive and fruitful consultations;

- Remedial action to counter the adverse effects of the RBPs in question should also be sought and agreed upon in the consultation process;

- Special and preferential treatment of developing countries should be one of the main principles that should govern the outcome of the consultations;

- Possible participation of a third party in the consultation process, upon request by the claimant party. This third party could be another country whose trade and development was also affected by the same RBPs in question;

- Possible involvement of advisory and/or mediatory agents, subject to approval by the parties to the consultations;

- A more precisely defined and wider role for UNCTAD to play in the preparation for, and the assistance required in, holding such consultations. In addition to the existing relevant provisions in the Set, the role of UNCTAD could also include the possibility of a follow-up process to the outcome of such consultations. An additional function of conciliation added to the existing functions of the institutional machinery could also be explored;

- The date, duration and venue of consultations should be decided by the parties concerned. In this respect, due account should be taken of the financial burdens on developing countries and, in particular, on the least developed countries;

- Representation of Governments in such consultations could include, when appropriate, representatives of the enterprises concerned, or of their respective chambers of commerce.

IV. Proposals for stronger implementation of technical assistance advisory and training programmes, as called for in Section F, paras. 6 and 7 of the Set

7. Technical co-operation should be vitalized through the provision of UNDP funds and voluntary contributions by individual States, particularly developed countries.

8. In addition to regional and sub-regional seminars, there is an urgent need for the secretariat of UNCTAD to be able to respond effectively to demands for national advisory services and for training seminars on restrictive business practices.

9. The Secretary-General of UNCTAD should be requested to draw up as a matter of urgency a programme of action to deal with technical assistance, advisory and training needs of individual developing countries in the area of restrictive business practices.

V. Further review procedure

10. A third UN Conference to Review all Aspect of the Set (Third Review Conference) should be convened in 1995.

B. UNION OF SOVIET SOCIALIST REPUBLICS

[Original: RUSSIAN]

11. The Government of the Union of Soviet Socialist Republics stated that:

12. The Soviet side considers the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices to be a unique international document, establishing specific norms of conduct for States as well as enterprises in this area that is of such importance to international trade and development. The elaboration of these principles and rules was the result of a compromise by various groups of States, and the text reflects a complex balance of their interests. In this connection, the Soviet side is of the opinion that a revision of the document would not be advisable at the present time.

13. This does not mean, however, that the Soviet side renounces its right to submit, if necessary, proposals to amend or supplement the text at a later date as, for example, in the course of the forthcoming United Nations Conference to Review all Aspects of the Set.

14. The Soviet side will continue its constructive efforts to increase the effectiveness of the Set, and to ensure real progress in the control of restrictive business practices in international trade, which constitutes an extremely important area of economic policy. In this context, the Soviet side considers that it would be possible to concentrate efforts on settling a number of important practical issues on which, as a result of the resolutions of the seventh session of UNCTAD, a certain degree of consensus seems to have been achieved. This concerns ways of ensuring transparency in the field of RBPs and the drafting of specific procedures for intergovernmental consultation, with a view to the control and elimination of such practices. Provisions concerning these matters could be agreed upon at the forthcoming United Nations Conference to Review all Aspects of the Set.

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Ninth session
Geneva, 23 April 1990

COMMUNICATION FROM THE PERMANENT MISSION OF
THE UNION OF SOVIET SOCIALIST REPUBLICS

The attached communication is being circulated to members of UNCTAD at the request of the Permanent Mission of the Union of Soviet Socialist Republics to the United Nations Office and other Intergovernmental Organizations at Geneva.

GE.90-51142/6101A

Geneva, 24 April 1990

Sir,

In connection with the fact that the provisional list of participants in the ninth session of the Intergovernmental Group of Experts on Restrictive Business Practices shows the delegation of the Federal Republic of Germany to include Mr. Wangemann, an official of the Federal Republic's Cartel Office, an entity unlawfully located in West Berlin, I have the honour to inform you that the Soviet delegation maintains its well-known position on this matter.

Accept, Sir, the assurances of my highest consideration.

(Signed) V. Kuvshinov

USSR Representative to the
ninth session of the
Intergovernmental Group of
Experts on Restrictive
Business Practices

Mr. Eric Sahlen
Chairman
Intergovernmental Group of
Experts on Restrictive
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COMMUNICATION FROM THE PERMANENT MISSION OF THE
UNITED KINGDOM OF GREAT BRITAIN AND NORTHEN IRELAND

The attached communication is being circulated to members of UNCTAD at the request of the Permanent Mission of the United Kingdom of Great Britain and Northen Ireland to the United Nations Office and other Intergovernmental Organizations at Geneva.

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UNITED KINGDOM MISSION
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27 April 1990

Mr Eric Sahlin
Chairman
Ninth Session of the UNCTAD Intergovernmental
Group of Experts on Restrictive Business
Practices

Sir,

With reference to the communication of the delegation of the USSR dated 24 April 1990 (circulated under cover of UNCTAD document TD/B/RBP/74 dated 24 April 1990), I have, on behalf of the delegations of France, United Kingdom, and United States, to reserve the right to reply and to have that reply given the same distribution as the statement given by the Soviet Union.

Accept, Sir, the assurances of my highest consideration.

D O Hay-Edie
Representative of the United Kingdom to the Ninth Session of the Intergovernmental Group of Experts on Restrictive Business Practices (First Secretary, Permanent Mission of the United Kingdom in Geneva)